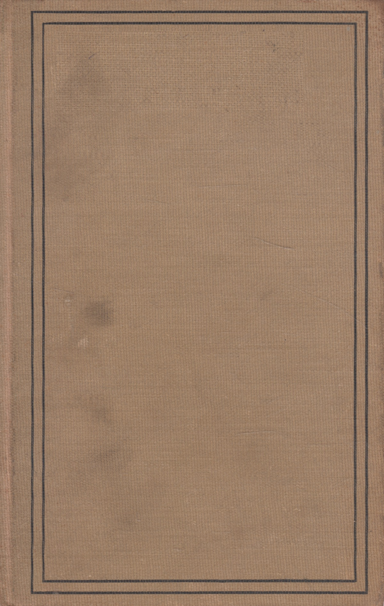


CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

DECEMBER 7, 1936, TO APRIL 25, 1937

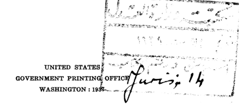
WITH

ABSTRACT OF
DECISIONS OF THE SUPREME COURT
IN COURT OF CLAIMS CASES

REPORTED BY

CHARLES F. KINCHELOE

VOLUME LXXXIV



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Chief Justice

Fenton W. Booth

Judges

William R. Green
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Thomas S. Williams
Richard S. Whaley

Auditor

Charles F. Kincheloe

Secretary

Walter H. Moling

Chief Clerk
Willard L. Hart

Assistant Clerk
Fred C. Kleinschmidt

Bailiff

Jerry J. Marcotte

Assistant Attorneys General

(Charged with the defense of the Government)

Harry W. Blair
James W. Morris
Robert H. Jackson

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HAYNER H. GORDON.
EWART W. HOBBS.
RICHARD H. AKERS.
C. WILLIAM RAMSEYER.
CLYDE A. NORTON.

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CASES DECIDED

IN

THE COURT OF CLAIMS

December 7, 1936, to April 25, 1937

ORDNANCE ENGINEERING CORPORATION v. THE UNITED STATES

[No. 34680. Decided November 9, 1936. Findings of fact amended March 1 and April 5, 1937, with supplemental opinion.]

On the Proofs

Infringement of patents for illuminating shells; compensation for infringement and use. For the decisions and opinions of the court on the questions of validity and infringement by the Government of the patents in suit, *see* 68 C. Cls. 301, and 73 C. Cls. 379.
Interest on claim.—Interest held not allowable on the portion of the claim based on contract.

The Reporter's statement of the case:

Messrs. George R. Shields and *Eugene V. Myers* for the plaintiff. *King & King* and *Mr. Franklin G. Manley* were on the briefs.

Messrs. Carl P. Goepel and *Howard L. Godfrey*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. J. F. Mothershead* was on the brief.

In decisions and opinions of June 10, 1929 (68 C. Cls. 301), and December 7, 1931 (73 C. Cls. 379), the court held certain claims of the patents in suit valid and infringed by the United States, and remanded the case for proof of the com-

pensation due the plaintiff for such infringement, or use of the patented inventions; and upon the evidence submitted, the court, on this question, makes the following special findings of fact:

1. This suit was filed for infringement of four patents issued to plaintiff as assignee of Axel G. Bergman. The patents are numbers 1305186, 1305187, 1305188, and 1381445. The application which matured into patent no. 1305188 is a division of the application upon which patent no. 1305186 issued.

In its opinion of June 10, 1929, this court found that claims 1 to 6, inclusive; 8 to 11, inclusive; and 15 to 17, inclusive, of patent no. 1305186 were infringed; that claim 8 of patent no. 1305188 was infringed, and that patents nos. 1305187 and 1381445 were not infringed because the defendant had an implied license under these latter two patents.

2. The period of accounting herein extends from May 27, 1919, the date of issue of plaintiff's patents numbers 1305186 and 1305188, to December 31, 1928.

3. During the said accounting period, defendant manufactured at the naval ordnance plant, Baldwin, New York, certain illuminating shell (sometimes called star shell), having the construction heretofore held to infringe.

4. Illuminating shell are of three categories: (1) Regular or service shell, (2) ballistic shell, and (3) experimental shell. Regular or service shell are shell built to approved service designs and specifications, intended for issue to ships as battle or practice ammunition. Ballistic shell are not intended for battle or practice use, but are samples fired for test purposes from each lot manufactured before the lot is issued or sent to store. Experimental shell are shell built for experimental purposes.

5. In response to a call of this court dated September 3, 1929, the Navy Department September 19, 1929, submitted tables showing the number of 3-, 4-, 5-, and 6-inch star shell produced for each month from May 1919 to December 1928, inclusive. Table no. 1, reproduced herewith, is a summary of the information furnished this court in the response referred to above.

Reporter's Statement of the Case

TABLE No. 1

Year	3″	4″	5″	6″	Total
1919	17, 805	342	38	0	18, 185
1920	125	12, 507	8, 732	0	21, 364
1921	7, 250	8, 233	3, 004	0	18, 487
1922	8, 938	2, 051	5	0	10, 994
1923	2, 370	6, 977	5, 617	0	14, 964
1924	0	895	19, 767	0	20, 662
1925	0	632	7, 165	12, 834	20, 631
1926	0	28, 445	0	0	28, 445
1927	8, 080	549	8, 791	0	17, 420
1928	4, 885	4	8, 287	3, 635	16, 811
Total	49, 453	60, 635	61, 406	16, 469	187, 963

6. Subsequently, in response to a further call of this court, dated October 30, 1929, the Navy Department furnished additional information, showing the same information as already summarized in table 1 above, and, in addition, the number of ballistic and experimental shell manufactured or assembled from May 1919 to December 1928, as follows:

TABLE No. 2

Year	3″			4″			5″		
	Bal.	Exp.	Total	Bal.	Exp.	Total	Bal.	Exp.	Total
1919	322	120	442	4	117	121	0	38	38
1920	0	141	141	119	35	154	98	118	216
1921	80	94	174	80	20	100	30	40	70
1922	215	32	247	20	185	205	15	125	140
1923	33	0	33	210	529	739	300	240	540
1924	0	21	21	30	0	30	675	265	940
1925	0	15	15	0	60	60	255	30	285
1926	0	51	51	457	5	462	0	29	29
1927	150	120	270	20	25	45	255	65	320
1928	75	40	115	0	0	0	270	65	335
Total	875	634	1, 509	940	976	1, 916	1, 898	1, 015	2, 913

Year	6″			8″			Total
	Bal.	Exp.	Total	Bal.	Exp.	Total	
1919	0	0	0	0	0	0	601
1920	0	28	28	0	0	0	539
1921	0	14	14	0	0	0	358
1922	0	10	10	0	0	0	602
1923	0	20	20	0	0	0	1, 332
1924	0	65	65	0	10	10	1, 066
1925	405	75	480	0	5	5	845
1926	0	15	15	0	0	0	557
1927	0	95	95	0	0	0	730
1928	150	195	345	0	0	0	795
Total	555	517	1, 072	0	15	15	7, 425

Reporter's Statement of the Case

7. The Navy Department reported that it had manufactured and used prior to May 27, 1919, 147 additional 3-inch star shell, and 50 additional 4-inch star shell; that it had manufactured prior to May 27, 1919, 4,448 additional 3-inch star shell, which have either been issued from store since that date or are still in store; and that it manufactured 16 projectiles prior to May 27, 1919, which were fired for test purposes subsequent to that date.

8. The total number of star shell of all classes manufactured or assembled by the defendant to and including December 1928 was 200,049. Of these, 197 were made and fired prior to May 27, 1919. The total number made or used during the accounting period was 199,852. Deducting from this latter figure 7,425 ballistic and experimental shell leaves a net total of 192,427 infringing regular service shell made or used during the accounting period, classified as follows:

3-inch	53, 901
4-inch	60, 651
5-inch	61, 406
6-inch	16, 469

9. Plaintiff never manufactured or sold any shell of the construction found by this court to infringe. It manufactured parts for a small number of such shell, but before the completion of even a single shell the defendant commandeered plaintiff's plant and began the manufacture of the said shell.

10. During the accounting period there was no source of supply for such shell other than the commandeered Baldwin plant.

11. There is no user of star shell of the infringing construction other than the Government.

12. There is no satisfactory evidence as to what it would have cost plaintiff to manufacture the infringing shell, because plaintiff never manufactured any.

13. There is no evidence of the price which the Government would have paid plaintiff for such shell if purchased in the open market.

14. There is no satisfactory evidence by which the profits lost by plaintiff, as a result of the defendant's infringement, may be determined.

15. Defendant made no profit calculable in dollars from its infringement. It sold no shell, but merely manufactured for its own use.

16. Plaintiff never licensed anyone under the patents here involved, so there is no established royalty to serve as a measure of damages.

17. In response to a call of this court dated October 30, 1929, the Navy Department submitted cost data showing a cost of production of $5,927,501.90 for all star shell manufactured from the beginning of manufacture to the end of the accounting period, this cost including shell bodies but excluding time fuses, and excluding part of the factory overhead.

In furnishing the above figures defendant concurrently claimed that the cost figure was in excess of the true cost by approximately $526,000 because of duplication of material charges from the beginning of the accounting period to and including a part of 1923.

18. Subsequently defendant submitted revised cost data in an attempt to explain the asserted duplication of material costs. It does not satisfactorily appear that this subsequently prepared cost data represents true or actual costs.

19. The time fuses with which the shells are equipped when fired were not made at the Baldwin plant, were not applied to said shell thereat, and were a standard article applicable to other types of shell. There is no satisfactory evidence that plaintiff's patents, held infringed in this suit, made any inventive contribution to said fuses.

20. The unmachined shell bodies were not made at the Baldwin plant, but were supplied to said plant by the Navy Department. There is no satisfactory evidence that the said shell bodies as supplied to the said plant embodied any inventive contribution of the patents held infringed in this suit. The work done on said shell bodies to adapt them to

rear ejection was done at the Baldwin plant, and the cost of such work is included in the cost stated in finding 23.

21. The average purchase price of shell bodies was as follows:

3-inch	$6.40
4-inch	11.01
5-inch	12.76
6-inch	19.75

The total purchase price of shell bodies included in the cost figures given in finding 17 is as follows:

3-inch, 53,901 at $6.40	$344,966.40
4-inch, 60,651 " 11.01	667,767.51
5-inch, 61,406 " 12.76	783,540.56
6-inch, 16,469 " 19.75	325,262.75
Total	2,121,537.22

22. The fair and reasonable cost of fuses for the 192,427 infringing shell was $534,947.06.

23. A fair and reasonable factory cost for the 192,427 regular service shell made or used during the accounting period, including material, labor, and all factory overhead, including the cost of administering the Baldwin plant for the entire accounting period, but excluding the cost of shell bodies and time fuses, and excluding Navy general administrative expense not connected with the manufacture of star shell, for the purpose of fixing a reasonable royalty, is $4,075,239.36.

24. A fair and reasonable grand average cost per shell, on the basis stated in finding 23, is $21.18 per shell.

25. Fair and reasonable average costs per shell, according to size, on the basis stated in finding 23, are as follows:

3-inch	$13.70
4-inch	19.55
5-inch	25.69
6-inch	34.83

26. On February 7, 1920, plaintiff wrote to the Navy Department a letter which is in evidence as a part of defendant's exhibit 51 and which by reference is made a part of this finding. In this letter the plaintiff offered a basis of negotiation for settlement of its differences with the defendant.

Plaintiff therein proposed to establish its patents "by appropriate action in the Court of Claims * * *", and proposed:

> In the event that the contractor's patents, above-referred to, shall be established as valid, then it is agreed that the contractor's rights to recovery shall be fixed and limited as follows * * *:
>
> 3-inch shell: First 20,000, $1 per shell; thereafter 25 cents per shell up to 100,000 shell; thereafter 10 cents per shell.
>
> 4-inch shell: First 20,000, $1 per shell; thereafter up to 50,000, 50 cents; thereafter 20 cents.
>
> 5-inch shell: First 10,000, $1 per shell; thereafter up to 25,000 shell, 75 cents; thereafter 30 cents.

In this letter plaintiff also referred to a computation of the fair value of the use of its patents at 5 percent of the cost of production.

Defendant did not accept this offer.

27. A fair and reasonable royalty for plaintiff's entire group of patents nos. 1305186, 1305187, 1305188, and 1381445 is 7½ percent of defendant's factory cost stated in finding 23, or $305,642.95.

28. A fair and reasonable apportionment of royalty between the patents specified in finding 27 is 85 percent to patent no. 1305186 and 5% to each of the others.

29. A fair and reasonable deduction for the free license of the defendant under the two patents nos. 1305187 and 1381445 is 10% of $305,642.95, or $30,564.30.

30. Of the 192,427 regular service star-shell manufactured or used during the accounting period, 109,277 did not employ multiple parachute structure, as defined by claims 1, 2, 3, 4, and 6 of patent no. 1305186. The remainder, 83,150, did employ such structure.

31. A fair and reasonable apportionment of royalty to the multiple parachute claims is 5 percent of the royalty for the entire group of patents, or $15,282.15.

32. A fair and reasonable deduction for the shell not employing multiple parachutes is $\frac{109,277}{192,427}$ of $15,282.15, or $8,678.55.

Reporter's Statement of the Case

33. Defendant is not entitled to any credit for shell rejuvenation. "Rejuvenation" means the return of shell to the factory for replacements in the internal mechanism.

34. The reasonable and entire compensation for the infringement complained of is a reasonable royalty of—

		$305, 642. 95
Less deductions:		
(1) License under patents 1305187 & 1381445 (see finding 29)	$30, 564. 30	
(2) For shell not embodying multiple parachutes (see finding 32)	8, 678. 55	
		39, 242. 85
		266, 400. 10

with interest at 6% from January 1, 1920, on the amounts shown in the following table until January 1, 1929, and thereafter at 6% on $266,400.10 until payment of the judgment.

The following tabulation shows the amount of $266,400.10 allocated (for the purpose of computing interest) with respect to the yearly output of star shell as given in finding 5, together with interest at 6% on said yearly amount to the end of the accounting period.

Year	Number of regular shell made (see finding 5)	Annual allocation	Interest at 6% to end of accounting period
1919	18, 185	$25, 773. 61	$13, 917. 75
1920	21, 364	30, 279. 21	14, 534. 02
1921	18, 487	26, 201. 64	11, 004. 69
1922	10, 994	15, 582. 62	5, 609. 74
1923	14, 964	21, 204. 00	6, 361. 20
1924	20, 662	29, 284. 27	7, 028. 22
1925	20, 631	29, 240. 33	6, 032. 57
1926	28, 445	40, 315 11	4, 837. 81
1927	17, 420	24, 689. 38	1, 481. 36
1928	16, 811	23, 823. 93	------------
	187, 963	266, 400. 10	70, 807. 36

The court decided that plaintiff was entitled to recover the sum of $266,400.10, with interest, for the infringement of its patents, and rendered judgment accordingly, failing, however, to include in the judgment the sum of $35,000 found due plaintiff on the original hearing of the case, on its contract with the Government.

AMENDMENT OF FINDINGS OF FACT, AND NEW JUDGMENT

On March 1, 1937, the findings of fact were amended by the court, and a new judgment was entered to include the above-noted $35,000, the new judgment being for $301,400.10, with interest on the $266,400.10 allowed for the patent infringement, computed on the various installments composing it, from the dates of their accrual.

The amendment of the findings of fact consisted of the substitution of a new ultimate finding of fact LIII, which, as subsequently amended, April 5, 1937, is as follows:

> The court finds as an ultimate fact that plaintiff's rights as defined in claims 1, 2, 3, 4, 5, 6, 15, 16, and 17 of Patent 1305186 were valid and infringed by the Government in its manufacture of star shells after May 27, 1919, and prior to May 1922; and that plaintiff's rights as defined by claims 8, 9, 10, and 11 of the same patent were valid and infringed from May 27, 1919, to May 1922 and thereafter. Claim 18 of this patent was not infringed.
>
> Plaintiff's right as defined by claim 8 of Patent No. 1305188 is valid and has been infringed from May 27, 1919, and subsequent to May 1922. Claim 3 of this patent is invalid.
>
> The United States has an implied license under patents 1381445 and 1305187.

The court, on April 5, 1937, rendered the following supplemental opinion:

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff files a motion to consolidate judgments in this case. The case was decided by the court on June 10, 1929, and on that date it was held that as to one item of plaintiff's claim a reasonable recovery would be $35,000. The remaining issues revolve around an asserted infringement of patent rights, and as to this issue the court decided as stated in its opinion in 68 C. Cls. 301, 309, et seq. The case was then remanded to a Commissioner to take proof as to the damages for such infringements. Proof was adduced and on January 17, 1936, the Commissioner found the plaintiff was entitled to recover the sum of $266,400.10, with interest

thereon at the rate of six per centum per annum as stated in said report. November 9, 1936, the court awarded plaintiff a judgment for the sum stated in the Commissioner's report. The court was not aware at the time that the sum of $35,000 previously awarded the plaintiff was not included in said judgment as it should have been, and therefore the motion to consolidate the judgments is allowed and the former judgments of the court set aside and a new judgment this date entered, which will include the sum of $35,000.

In addition to seeking a consolidation of judgments, the plaintiff contends for interest upon the $35,000, and cites in support thereof the case of the *Barrett Co.* v. *United States*, 273 U. S. 227. The case is inapposite. In the *Barrett case* the contract was canceled under the provisions of the act of June 15, 1917, 40 Stat. 183, authorizing the exertion of such authority by the Government. There was no provision in the Barrett contract authorizing the Government to cancel or terminate the same, as there is in the instant case. The termination or cancellation of the plaintiff's contract was strictly in accord with a stipulated right to do so, conditioned only upon a just and fair settlement of any loss the contractor suffered if the contract was so terminated. This court found that the Government was within its rights in terminating the contract and that $35,000 constituted a just and fair settlement for any damages suffered by the contractor. Under the act of June 15, 1917, *supra*, the contract in effect was taken by the Government, and a judgment for just compensation was provided for in the act, and under the authorities, too familiar to cite, the plaintiff was entitled not to interest as such but as a part of just compensation sufficient to compensate for the property loss sustained.

We do not need to refer to motions for new trials and to amend findings which were disposed of before the entry of final judgment in this case.

The defendant's motion for new trial and for additional special findings is overruled.

Finding LIII is vacated and withdrawn and a new finding LIII is now filed reading as follows:

> The court finds as an ultimate fact that plaintiff's rights as defined in claims 1, 2, 3, 4, 5, 6, 15, 16, and 17 of Patent No. 1305186 were valid and infringed by

Opinion of the Court

the Government in its manufacture of star shells after May 27, 1919, and prior to May 1922; and that plaintiff's rights as defined by claims 8, 9, 10, and 11 of the same patent were valid and infringed from May 27, 1919, to May 1922 and thereafter. Claim 18 of this patent was not infringed.

Plaintiff's right as defined by claim 8 of Patent No. 1305188 is valid and has been infringed from May 27, 1919, and subsequent to May 1922.

Claim 3 of this patent is invalid.

The United States has an implied license under patents 1381445 and 1305187.

This we do to comply with the decision of the Supreme Court in the *Esnault-Pelterie case*, 299 U. S. 201.

The judgment of this court rendered on November 9, 1936, is hereby set aside and a new judgment this date awarded the plaintiff as follows:

For infringement of patent rights, as stated in the Commissioner's report, $266,400.10 with interest at six per centum per annum from January 1, 1920, on the amounts and for the periods as shown in the following table until January 1, 1929, and thereafter interest at the rate of six per centum per annum on the sum of $266,400.10 until payment of the judgment:

Year	Number of regular shell made	Annual allocation	Interest at 6% to end of accounting period
1919	18, 185	$25, 773. 61	$13, 917. 75
1920	21, 364	30, 279. 21	14, 534. 02
1921	18, 487	26, 201. 64	11, 004. 69
1922	10, 994	15, 582. 62	5, 609. 74
1923	14, 964	21, 204. 00	6, 361. 20
1924	20, 662	29, 284. 27	7, 028. 22
1925	20, 631	29, 240. 33	6, 032. 57
1926	28, 445	40, 315. 11	4, 837. 81
1927	17, 420	24, 689. 38	1, 481. 36
1928	16, 811	23, 829. 93	----------
	187, 963	266, 400. 10	70, 807. 36

The plaintiff is also awarded judgment for $35,000 making a total judgment for the principal sum of three hundred one thousand, four hundred dollars and ten cents ($301,-400.10) with interest on $266,400.10 as stated above. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

THE CREEK NATION v. THE UNITED STATES

[No. F-205. Decided November 9, 1936. Motion for new trial overruled May 3, 1937]

On Order of Remand by Supreme Court

Claim for Indian land; date of taking; value; just compensation.—Under the ruling of the Supreme Court (295 U. S. 103), *held*, that the taking of the land in question by the Government was effected by the Act of Congress of February 13, 1891, directing its disposal by the Government; and that just compensation therefor was the value of the land as of that date, with such additional sum as would make "just compensation" at the delayed date of payment, which was held to be five per cent per annum on such value from the date of the taking.

The Reporter's statement of the case:

Mr. Paul M. Niebell for the plaintiff.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Harry W. Blair*, for the defendant. *Mr. George T. Stormont* was on the brief.

The court, pursuant to the order of remand by the Supreme Court, made special findings of fact as follows in addition to those filed March 13, 1933, in its original decision in the case:

1. The value of the lands involved was $1.25 per acre on February 13, 1891, and the value of 5,454.29 acres, for which the court held plaintiff was entitled to compensation, was $6,817.86, on that date.

2. Interest at the rate of 5 per cent per annum on $6,817.86, from February 13, 1891, to date, is $15,592.03.

(For original findings of fact and opinion, *see* 77 C. Cls. 159.)

The court decided there was due the plaintiff the sum of $22,409.89 on its petition, and due the Government $76,805.51 on its counterclaim (77 C. Cls. 159), and that plaintiff was therefore not entitled to judgment in any amount.

Opinion of the Court

WILLIAMS, *Judge*, delivered the opinion of the court:

The United States, under the terms of a treaty entered into with the Sac and Fox Indians on February 18, 1867 (15 Stat. 495), ceded to those Indians certain lands in what is now the State of Oklahoma. By reason of an erroneous survey of the lands so ceded 5,575.57 acres of land belonging to the Creek Nation were included in the Sac and Fox country. The erroneous survey was approved by the Commissioner of the General Land Office in 1873, the error not being discovered.

The United States and the Sac and Fox Indians entered into an agreement on July 12, 1890, which was approved by the act of February 13, 1891 (26 Stat. 749), whereby those Indians ceded back to the United States all the lands which had been ceded to them by the United States in the treaty of 1867. Thereafter, on September 18, 1891 (27 Stat. 989), the President, pursuant to this agreement and the act of Congress approving it, issued a proclamation that after allotments had been made to the Sac and Fox Indians as provided in the agreement of cession, the residue of the area ceded by the Sac and Fox Nations be opened to white settlement. Under this proclamation disposals were made of the 5,575.57 acres of Creek lands which had, because of the erroneous survey, been included in the Sac and Fox Reservation. The Creek Nation on July 3, 1926, instituted suit in this court under a special jurisdictional act approved May 24, 1924 (43 Stat. 139), seeking recovery for the value of the 5,575.57 acres of its lands thus taken.

The court, on March 13, 1933, made special findings of fact, upon which it was decided, as a conclusion of law, that the Creek Nation was entitled to recover the sum of $163,-628.70, the value of 5,454.29 acres of the lands involved. The amount which the court found the plaintiff was entitled to recover was based on the value of the lands as of the date of the filing of the plaintiff's petition. It was also found by the court that the defendant upon its counterclaim was entitled to recover from the plaintiff the sum of $76,805.51, and judgment was entered for the plaintiff for the difference, or $86,823.19. *The Creek Nation* v. *United States* (77 C. Cls. 159).

Opinion of the Court

The Supreme Court, upon the defendant's application, granted certiorari and upon a review of the case, *United States* v. *Creek Nation* (295 U. S. 103), reversed the decision of this court upon the single point respecting the date as of which the value of the lands taken should be ascertained. The Court said:

> In the court below, as its opinion shows, the parties were agreed that the lands in the strip were unceded Creek lands; and that as to such of them as were disposed of under the act of 1891 the Creek tribe is "entitled to compensation." But the parties were not agreed respecting the time as of which the value should be ascertained. The tribe contended for the value in 1926, when the suit was brought; while the Government stood for the value at the time of the appropriation, which it insisted was in 1873, when Darling's erroneous survey was approved by the Commissioner of the General Land Office, or, in the alternative, at the time the lands were disposed of under the act of 1891.
>
> * * * * *
>
> Plainly the appropriation was not in 1873, when Darling's survey was approved by the Commissioner of the General Land Office. That survey did not effect any change in the existing ownership; nor was it intended to do so. The most that can be said of it is that it was done erroneously and, in the absence of correction, might lead to further error.
>
> But not so of the disposals under the act of 1891. They were intended from their inception to effect a change of ownership and were consummated by the issue of patents, the most accredited type of conveyance known to our law. True, they rested on an erroneous application of the act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals. It was through them that the lands were taken; so the compensation should be based on the value at that time, and not, as ruled below, on the value when the suit was begun.
>
> * * * * *
>
> It follows that the judgment must be reversed, with directions for such further proceedings as may be necessary to bring the award of compensation into conformity with this opinion.

The case is now before us on the order of remand, and we find the parties in disagreement as to the holding of the Supreme Court in respect to the date or dates on which the value of the lands taken should be ascertained. The defendant contends that under the ruling of the Supreme Court these values should be ascertained (1) as of February 13, 1891, the date of the approval of the act of Congress under the erroneous application of which the lands were disposed of, or (2) that if this contention be not right then as of the dates upon which homestead entries were made upon the lands. The plaintiff, on the other hand, contends that the value of the lands should be ascertained as of the dates on which the Government issued patents therefor during the years 1893 to 1909, inclusive, and has submitted evidence showing the average value of the lands as of those dates.

The Court characterizes the "taking" of plaintiff's lands as "disposals" of them. These "disposals" were "consummated by the issue of patents signed by the President." After pointing out that the United States would have plainly been entitled to a cancellation of the "disposals" if it had instituted suits for that purpose, and that its failure to do so in effect confirmed the "disposals", the Court said:

> True, they rested on an erroneous application of the act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals. It was through them that the lands were taken; so the compensation should be based on the value at that time.

The words "at that time" clearly refer to the act of 1891, under the erroneous application of which "disposals" of plaintiff's lands were made. If the act of 1891 had directed the "disposals", the "taking" undoubtedly would have been as of the date of the act, and since the Court holds that the matter stands as if the act had distinctly directed the "disposals", there can be no doubt that plaintiff's compensation for the lands taken must, under the Court's decision, be based on the value of the lands as of the date of the ap-

proval of that act, February 13, 1891, with such an additional amount as will produce the present full equivalent of that value paid contemporaneously with the taking, a suitable measure of which the court holds is interest at the rate of 5 percent per annum.

Under the additional findings of fact, this day made, the value of the lands involved was $1.25 per acre on February 13, 1891. The value of the 5,454.29 acres for which plaintiff is entitled to compensation was $6,817.86. The additional sum, using interest as a suitable measure therefor, required to produce the present full equivalent of that value is $15,592.03, making the total compensation to be awarded plaintiff under the opinion of the Supreme Court, $22,409.89. Since the amount of the counterclaim which the defendant has established and is entitled to offset against the claim of the plaintiff is in excess of the amount of compensation due plaintiff on its petition, it follows that the plaintiff is not entitled to judgment in any amount. An appropriate order dismissing the petition will be entered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

THE SIOUX TRIBE OF INDIANS v. THE UNITED STATES

[No. C-531. Decided November 9, 1936. Motion for new trial overruled June 1, 1937]

On the Proofs

Indian claims; breach of treaty provisions for school facilities and attendance.—The provisions of the treaty between the Government and the plaintiff tribe of Indians for furnishing school buildings and teachers by the Government and requiring school attendance by the children of the tribe did not constitute a unilateral contract obligating the Government alone, and the Government was under no obligation to furnish such educational facilities if children could not be induced or compelled to attend school.

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Proof.—The character and disposition of aboriginal Indians may not be ignored in the consideration of the evidence in Indian litigation.

Proof of damage; nominal damage; jurisdiction.—The court is without jurisdiction to award nominal damages. In order to recover damage the plaintiff must establish a pecuniary loss, one capable of being reduced to dollars and cents with reasonable certainty.

Same.—It has long been the law that damages may be recovered for breach of contract even if they cannot be calculated with absolute exactness, but the courts have not abandoned the rule that in order to recover damages the plaintiff must prove a reasonable basis for computations relied upon; the proofs must establish facts which convince the court that computations essentially hypothetical in their nature exclude speculation and conjecture and bear a direct relationship to the amount of the damages to be awarded.

Same; estimate as basis for judgment.—An estimate, to form the basis for a money judgment, must of necessity be predicated upon fundamental facts which import to it a degree of verity and reasonableness. Its origin and development must disclose to a convincing extent that the figures given do not involve the court in indulging in conjecture and speculation as to the true or possible situation in the premises.

Treaty provision for school facilities and attendance; interest of parties to treaty.—Where the treaty between the Government and the plaintiff tribe of Indians provided for educational facilities to be furnished by the Government and for school attendance by the children of the tribe, the Government was as much interested as the Indian parents in the education of the children, to bring about their civilization.

Damage from failure in educational facilities and school attendance; calculation of damage.—The children of the plaintiff tribe of Indians were the ones who suffered substantial loss from lack of school facilities and attendance required by treaty for children of the tribe; and while the resulting lack in their education probably would result in a loss, in some degree, of civilizing influence on the tribe, the damage from such loss, in money, is one which in itself resists calculation.

The Reporter's statement of the case:

Mr. Ralph H. Case for the plaintiff. *Messrs. Kingman Brewster, J. S. Y. Ivins, C. C. Calhoun, O. R. Folsom-Jones,* and *Richard B. Barker* were on the briefs.

Mr. George T. Stormont, with whom was *Mr. Assistant Attorney General Harry W. Blair,* for the defendant.

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The court made special findings of fact as follows:

1. By an Act of Congress approved June 3, 1920 (41 Stat. 738), it was provided:

That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.

SEC. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject, however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or band of Indians the court may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Sioux Tribe or any bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed, and no other verification shall be necessary. Official letters, papers,

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documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for said tribe or bands of Indians.

SEC. 3. That upon the final determination of such suit, cause, or action the Court of Claims shall decree such fees as it shall find reasonable to be paid the attorney or attorneys employed therein by said tribe or bands of Indians under contracts negotiated and approved as provided by existing law, and in no case shall the fee decreed by said Court of Claims be in excess of the amounts stipulated in the contracts approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and no attorney shall have a right to represent the said tribes or any band thereof in any suit, cause, or action under the provisions of this Act until his contract shall have been approved as herein provided. The fees decreed by the court to the attorney or attorneys of record shall be paid out of any sum or sums recovered in such suits or actions, and no part of such fees shall be taken from any money in the Treasury of the United States belonging to such tribe or bands of Indians in whose behalf the suit is brought unless specifically authorized in the contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior as herein provided: *Provided*, That in no case shall the fees decreed by said court amount to more than 10 per centum of the amount of the judgment recovered in such cause.

2. Under authority of this act the Sioux tribe of Indians filed its petition on May 7, 1923. On February 24, 1934, upon motion by the plaintiffs, the plaintiffs were given permission to sever their original petition, and under this permission filed their "separated and amended" petition herein on May 7, 1934.

3. The petition filed in this case was signed and verified by the attorneys for the plaintiffs pursuant to their contract of employment approved according to law.

4. On April 29, 1868, a treaty was duly made and executed by and between the plaintiffs on the one part and the de-

fendant on the other part, which treaty was duly ratified by the Senate of the United States on February 16, 1869, and proclaimed by the President of the United States on February 24, 1869.

5. The pertinent articles of the said treaty are as follows (15 Stat. 635):

> ARTICLE II. The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri river where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.
>
> ARTICLE IV. The United States agrees, at its own proper expense, to construct at some place on the Missouri river, near the centre of said reservation, where timber and water may be convenient, the following buildings, to wit: a warehouse, a storeroom for the use of the agent in storing goods belonging to the Indians, to cost not less than twenty-five hundred dollars; an

agency building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a schoolhouse or mission building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding five thousand dollars. * * *

ARTICLE VII. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for not less than twenty years.

ARTICLE XI. In consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase. * * *

ARTICLE XII. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in Article VI of this treaty.

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ARTICLE XV. The Indians herein named agree that when the agency house and other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right, subject to the conditions and modifications of this treaty, to hunt, as stipulated in Article XI hereof.

ARTICLE XVI. The United States hereby agrees and stipulates that the country north of the North Platte river and east of the summits of the Big Horn mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians, first had and obtained, to pass through the same; and it is further agreed by the United States, that within ninety days after the conclusion of peace with all the bands of the Sioux nation, the military posts now established in the territory in this article named shall be abandoned, and that the road leading to them and by them to the settlements in the Territory of Montana shall be closed.

6. The Congress of the United States passed an Act approved on March 2, 1889, entitled "An Act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder, and for other purposes."

Section 17 of the Act of March 2, 1889, aforesaid contains the following provisions for the education of children:

That it is hereby enacted that the seventh article of the said treaty of April twenty-ninth, eighteen hundred and sixty-eight, securing to said Indians the benefits of education, subject to such modifications as Congress shall deem most effective to secure to said Indians equivalent benefits of such education, shall continue in force for twenty years from and after the time this act shall take effect; * * *.

Section 20 of the Act of March 2, 1889, aforesaid, contains the following provisions for the education of children:

The Secretary of the Interior shall cause to be erected not less than thirty school-houses, and more, if found necessary, on the different reservations, at such points as he shall think for the best interests of the Indians,

> but at such distance only as will enable as many as possible attending schools to return home nights, as white children do attending district schools: *And Provided*, That any white children residing in the neighborhood are entitled to attend the said school on such terms as the Secretary of the Interior may prescribe.

7. According to the terms of the Act of March 2, 1889, that Act was to take effect only upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians in the manner and form prescribed in Article XII of the Treaty between the United States and the Sioux Indians, concluded April 29, 1868. Article XII of the last named treaty is as follows:

> No treaty for the cession of any portion or part of the Reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in Article VI of this treaty.

More than three-fourths of the adult male Sioux Indians accepted and consented to the Act of March 2, 1889, in accordance with the terms of the 12th Article of the Treaty of April 29, 1868, and the President of the United States, pursuant to the terms of the Act of March 2, 1889, proclaimed the Act to be in full force and effect on February 10, 1890.

8. In the years immediately following the treaty of 1868 there was but little change in the mode of life of the Sioux Indians. They continued to roam as before over their vast reservation and thousands of them lived and hunted in the country to the west and south of the reservation, rarely appearing at any of the agencies. A large portion of the tribe was still intractable, turbulent, and hostile, and refused to reside permanently upon the reservation given them by the treaty of 1868.

In 1873 the Commissioner of Indian Affairs recommended that military posts be established at each of the agencies to

enable the agents to enforce respect for their authority and to conduct agency affairs in an orderly manner.

In 1876–77 a large number of Sioux Indians under the leadership of Sitting Bull engaged in open hostilities with the Government, and this band of Sioux did not permanently return to the reservation until 1881. The Ogalala Sioux, under Red Cloud, their chief, numbering several thousand, and the Brulés, under their chief, Spotted Tail, also numbering several thousand, declined to permanently reside upon the reservation established for them, until some time in August 1878. During the prevalence of the above conditions very little was attempted to be done or could have been done in the way of educating the Indian children. Indian parents as a rule were not in sympathy with having their children educated in reservation schools, and it was not until many years after the execution of the treaty that this opposition to having their children educated in reservation schools was finally broken down. During the period just mentioned, the Government furnished school facilities in excess of the demand for them by or from the Indians.

9. The record fails to establish with any degree of certainty the population of the Sioux Indians, parties to the treaty of 1868, during the period from 1868 to 1889. The Sioux Indians refused with a few exceptions to be counted and opposed any steps in that direction, and they exaggerated their numbers for a variety of reasons.

By the act of March 2, 1889 (25 Stat. 980, 983), when the Sioux had become reconciled to a more settled mode of life, the Secretary of the Interior was directed to cause a census of the Sioux tribe to be taken by an agent appointed for that purpose. Thereafter the population returns of the various agencies are based upon actual counts.

10. The record fails to establish the average annual number of children between the ages of 6 and 16 among the plaintiff Indians during the years from 1870 to 1910; or the number of these who were physically and mentally fit to enter school, or the number who could and would have been compelled by their parents to enter school if sufficient school facilities had been provided.

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11. The record fails to establish the average yearly per capita cost for educating the Sioux Indian children as provided for in the treaty of April 29, 1868, and the act of March 2, 1889, during the period from 1871 to 1910, inclusive.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

This Indian case now before the court under the provisions of the special jurisdictional act appearing in Finding 1, is predicated upon an alleged failure of the Government to comply with a treaty obligation and an act of Congress respecting the education of the children of the Sioux Tribe of Indians between the ages of six and sixteen years.

The Sioux Tribe of Indians was one, if not the largest in population, of what is commonly designated as "Plains Indians." The Sioux Tribe is a generic designation of eight tribes then residing on reservations in the now States of North Dakota, South Dakota, Nebraska, and Montana. The treaty of April 29, 1868, about which much more must be said, delimited for the various tribes an extensive reservation embracing lands in the States mentioned and extending over to portions of the States of Wyoming, Kansas, Iowa, and Minnesota.

Article VII of the Treaty of April 29, 1868 (15 Stat. 635), reads as follows:

> In order to insure the civilization of the Indians entering into this Treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be

furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this Article to continue for not less than twenty years.

Section 17 of the act of March 2, 1889 (25 Stat. 888), is in the following language:

> That it is hereby enacted that the seventh article of the said treaty of April twenty-ninth, eighteen hundred and sixty-eight, securing to said Indians the benefits of education, subject to such modifications as Congress shall deem most effective to secure to said Indians equivalent benefits of such education, shall continue in force for twenty years from and after the time this act shall take effect; * * *.

The plaintiffs claim that the Government did not for the period from 1871 to March 2, 1889, provide a schoolhouse for every thirty (30) Indian children between the ages of six and sixteen years, nor was a teacher provided to teach the children "the elementary branches of an English education." The plaintiffs also claim that notwithstanding the enactment of the act of March 2, 1889, the Government continued to disregard its obligations under the treaty of 1868 for the extended period of twenty years provided in said act, and hence the Indian plaintiffs are entitled to a judgment for the total sum of $18,090,365.46 damages. This sum is arrived at by stating the plaintiffs' damages at $24,077,170 and deducting therefrom the sum of $5,986,804.54 admittedly expended by the Government during the forty-year period, i. e., from 1871 to 1910, for the education of the Indian children.

To sustain the case, the plaintiffs sedulously insist upon various contentions asserted as established. The record establishes that for a long period of time the Government did not strictly observe the provisions of the seventh article of the treaty of 1868 or Section 16 of the act of 1889 with respect to furnishing the educational facilities provided for therein. If this fact alone supplied the determinative issue and of itself created a monetary liability the case would be one of easy solution.

The governmental purpose to be accomplished by entering into the treaty is manifest from its express provisions. We

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are again called upon to repeat what has been for so long recognized and so many times stated, that the Government was treating with then uncivilized Indian tribes occupying a vast extent of landed territory which the Government knew it must acquire in part or face the inevitable conflict between the Indians and the white settlers. The governmental policy was firmly established. Its efforts were to be exerted in an attempt to civilize the Indians, teach them agriculture, and of course provide for their children the facilities of an elementary English education, a most important element of its policy.

Confining the discussion to the one question of education, how was it to be brought about under the provisions of Article VII of the Treaty of 1868? The Indians were first obligated to do certain things before the governmental obligation became effective. First, they expressly pledged "themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school." The verb "compel" as used in the treaty connotes positive action, and "induce" signifies persuasion. Obviously the Government was aware of the relationship existing between Indian parents and their children with respect to the latter's unwillingness to attend schools.

The treaty was not intended to obligate the Government to simply erect schoolhouses and employ teachers. It was not a unilateral contract. It exemplifies the experimental nature of the undertaking and imposes mutual obligations upon the parties. The benefits to accrue were not wholly material. The objects to be accomplished possessed a much wider significance. The Indian parent was to be taught to appreciate the value of an education to his child, and the children the advantage of the same in their contacts with the Whites now rapidly coming into Indian habitations and Indian lands.

The plaintiffs say that the Government is at fault if a sufficient number of Indian children could not be compelled or induced to attend available Indian schools, because the seventh article of the treaty of 1868 "made it the duty of the agent for said Indians to see that this stipulation is strictly complied with." Again it is contended that the Govern-

ment's failure to adopt the mandatory principles of compulsory education places it in a position where no benefit may accrue to a wrongdoer.

The contention is, we think, without merit. The Indian parents pledged themselves to *compel* attendance. The parents, not an Indian agent, possessed the authority to enforce obedience. True, the agent could induce attendance, but for him to seek to compel, as some of them did, was but to invite the demonstration of serious hostility, which actually occurred. Aside from this, however, the duty mentioned was to see to it that, when the *status quo* mentioned in the treaty obtained, the treaty provisions with respect to schoolhouses and teachers would be strictly adhered to. The burden of proof rests upon the plaintiffs to sustain their case.

The plaintiffs cite the record as one consistently overwhelming in establishing not only the willingness of the parents to compel their children to attend school, but also their persistent complaints over the absence of schoolhouses and teachers, and their protests against the failure of the Government to observe Article VII of the treaty of April 29, 1868.

The record with regard to the above contention is intertwined in so many of its aspects with the evidence introduced to establish the number of Indian children of school age under the provisions of the treaty of 1868 that a discussion of one involves the other, the plaintiffs of course conceding that the burden of proof rests upon them to prove the number of Indian children involved, the cost of their education, and the extent of the Government's defaults.

The plaintiffs concede that but one available method exists for ascertaining the number of Indian children of the school age whom the Government was obligated to educate under the treaty, and that is to first ascertain the yearly average number of all the tribes of the Sioux race entitled to treaty benefits and apply to this total tribal population a per centum figure which will disclose the number thereof who were children of the age set forth in the treaty.

By this process of computation the plaintiffs estimate the average number of Sioux Indians entitled to benefits under the treaty of 1868, i. e., from 1871 to 1910, a period of forty

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years, at 26,237. In order to establish the number of school children entitled to school facilities under the treaty the plaintiffs resort to the census enumeration of the Sioux Indian population for the years 1881 to 1910, inclusive, and the census enumeration of school children of treaty age for the same period of time, arriving at what is claimed to be a correct ratio of school children to the total population. Upon the figures thus employed the school children constituted 22.05% of the total Indian population for this period, and this percentage basis is applied to the entire forty-year period, viz, an annual school population of 5,785 children under the treaty.

It may be conceded that the method resorted to is the only one available for the purposes of the case. The difficulties pertaining to the establishment of the computations of record are apparent, a situation brought about by the nature of the controversy, involving as it does an extremely large Indian population with separate habitats, constrained in their habits, customs, and tribal life by the long-established traditions of their race, constantly suspicious and distrustful of the Whites, reluctant to ascribe to governmental policies, and extremely slow in acquiring the mode of life designed for their peace and civilization.

The issue is, may this court award the plaintiffs a judgment upon the record? Without going into minute detail, and condensing historical facts as much as possible, it is indisputably certain that prior to 1868 the Sioux Tribe of Indians, so far as its certain population is concerned, did not themselves nor did anyone else know it. These Indians roamed over a vast extent of territory. Many of the tribes were designated by different names, such as the Ogalalas, Yanktons, Hunkpapa, etc., etc., ruled by separate chiefs, and occupying territorial possessions distant from each other. The most that can be said is that Sioux Indians were numerous and their population estimated.

The discovery of gold in Montana in the year 1861 inaugurated a tide of emigration from the east to the west. The route of travel taken was over what is known as the Bozeman or Powder River Trail, and this route traversed in part the territory over which the Indians hunted and procured

buffalo and other species of wild game for a livelihood. This, and the establishment of military posts within the domain, generated intense hostility towards the Whites and the Government, a situation so acute as to lead to open warfare costing the lives of many Indians and soldiers of the United States. The so-called Powder River War beginning in 1866 was the event which led finally to the treaty of April 29, 1868.

It is therefore obvious that up to this date an authenticated census of Sioux Indians was impossible. The treaty of April 29, 1868, *supra*, was designed in a great part at least as one of peace and amity. It was consummated upon the heels of an armed conflict between the parties thereto, and at a time when the issue of population was not theretofore of primary importance. We say this advisedly, for a paragraph was inserted in Article X of the treaty imposing upon the Indian agent the duty of making a census of the Indian parties to the treaty.

What then happened subsequent to 1868 with respect to a reliable census of the Indians? The transition from a congenital wild life to one of the quiet pursuit of agriculture is not an overnight process. Indian treaties very frequently gave rise to hostilities, and the treaty of 1868 was not an exception. It is manifestly impossible to complete an enrollment of tribal Indians in the absence of some sort of a cohesive segregation enabling the census taker to count them. It may not be accomplished with speed in cases where an unnumbered population of Indians is brought into treaty relations with the Government and the treaty itself creates an undertaking of magnitude and delicacy in the adjustment and administration of Indian rights thereunder. The Indian officials were dealing with an unlettered and uncivilized race of people.

Unfortunately, the Government assented to Article XVI of the treaty of 1868—perhaps it prepared and suggested it. This article accorded hunting rights and privileges to the Sioux in what is designated as "unceded territory." It was a vast extent of territory outside the large reservation delimited to the tribe in the treaty. The Government agreed to prevent white men from settling upon or occupy-

ing any of said lands. Government military posts were to be withdrawn, a road leading to Montana was to be closed, and no one, save the Sioux, was to be permitted to pass through the domain without the Indians' consent.

The above concession and confirmed privilege granted the Indians fell short of its intended purpose and served to a very large extent to continue the nomadic habits of innumerable members of the tribe. This large area of land, at the time supplying buffalo and wild game to the Indians, attracted an indefinite number of Indians to it, and there they spent their time, frequently never reporting to any agency until the rigors of winter forestalled their continued occupancy of the same and forced them into various agencies. During the continuance of this condition an authentic census of the Indians was impossible.

The "unceded lands" brought on the war of 1876–1877 when the tribe under Sitting Bull in open hostilities defeated in certain engagements the troops of the Government, resulting in the death of General Custer and the men under his command, a contest brought to a close when Sitting Bull and a large number of his followers fled to Canada, from which place they did not return until 1881. Red Cloud, the belligerent chief and warrior of the Ogalala Sioux, resisted efforts to locate permanently on the treaty reservation until 1878. The Brulés under Spotted Tail were equally as reluctant to give up their nomadic habits and accept the benefits of the treaty and they did not do so until 1878 (20 Stat. 206, 232).

From what has been said it must not be assumed that all the bands or tribes of Sioux Indians were hostile to Governmental authority and refused to settle upon the reservations provided for them in the treaty of 1868. The record discloses that several of the tribes were peaceably removed to their reservations and were willing and anxious to accept the benefits of the treaty and cooperate with the Indian agents in its administration.

Notwithstanding this fact, the reports of the Indian agents clearly disclose that the pronounced disaffection of the numerous Indians for the Government and their open hostility towards it resulted in a measure of unrest and at

times open hostility towards the peaceable tribes on the part of the warriors, who not only solicited recruits from the peaceable Indians but upon some occasions resorted to the plunder and destruction of their property as a manifestation of their displeasure over their willingness to remain in amity with the Government.

Coincident with the execution of the treaty of 1868 and for many years thereafter, the great and powerful Sioux Nation was seriously divided. Innumerable Indians declined to reside upon the reservation with any degree of permanency. A large and powerful group led by able and cunning warriors resented the inroads of the Whites, and the building of the Union Pacific Railroad angered them. Treachery and deceit were charged against the Government. Indian wars and Indian depredations upon Government and Indian property characterized the era.

With this and the added fact that numerous Indians were constantly traversing the unceded lands in pursuit of buffalo, as well as the interchange of membership from one tribe to another, it is, we think, an incontrovertible fact that no census of the Indians could possibly have been taken upon any other basis than a mere estimate. True, in some few instances the Indian agents were able to count the Indians receiving supplies at their agencies, but a large portion of the population, turbulent, hostile and nomadic, did not submit to being counted.

The character and disposition of the aboriginal Indians may not be ignored in Indian litigation. As a matter of fact, this record discloses that the Indian Tribe was prone to exaggerate its numbers, moved to do so by a conviction that numbers brought fear to the Government's soldiers in the event of conflict, and likewise increased the quota of their supplies under Indian treaties.

The extinguishment of the Indians' hunting grounds, the passing to white settlers of the wide expanses over which they formerly roamed, culminated finally in the necessity of seeking food from other sources and that one great source was the Government. They finally submitted to governmental authority, came in large numbers to the delimited reservation, resumed amicable relationship with the

Government, and, from this point on, an authentic census of the Indians with few exceptions appears. Many Indian cases in this court reflect the multitude of difficulties encountered in making an enrollment of the Indians.

The court readily approves the established legal principle governing the assessment of damages in cases of a breach of contract set forth in the many cases cited in plaintiffs' able briefs. It is not essential to review them; the decisions do not depart from long-established precedents. The issue of allowable damages does not turn alone upon the one fact that the total number of Sioux Indians for the period of time claimed is no more than an estimate nor upon the failure of the plaintiffs to prove the population with absolute certainty. Damages must be proven with reasonable certainty. This court is without jurisdiction to award nominal damages. *Marion & Rye Valley Railway Co.* v. *United States*, 270 U. S. 280; *Perry* v. *United States*, 294 U. S. 330. The plaintiffs to recover must establish a pecuniary loss, one capable of being reduced to dollars and cents with reasonable certainty.

An estimate to form the basis for a money judgment must of necessity be predicated upon fundamental facts which import to it a degree of verity and reasonableness. Its origin and development must disclose to a convincing extent that the figures given do not involve the court in indulging in conjecture and speculation as to the true or possible situation in the premises. If the estimate generates acute controversy and contradiction, if the sources from which it comes denote its opinion character and disclose upon its face the impossibility of reliance upon its verity because of conditions obtaining at the time the figures were given, there is manifestly imposed upon the court the exercise of conjecture and speculation to accept the same as reflecting a reasonable degree of accuracy.

This record abounds with variances in agency reports upon which the plaintiffs must and do rely. The substantial variations which appear therein clearly indicate that the report itself was based upon a mere estimate. An example taken from some of them indexes the fact, viz, "The Indians who look to this agency (Cheyenne River) for subsistence

consist of portions of the Two Kettle, Sans Arc, and Minneconjoux bands of Sioux and number from 5,000 to 6,000." This report was made in 1874, six years after the execution of the treaty.

In 1871 the Superintendent of Indian Affairs for Montana reported, "Of these Teton Sioux, there are *probably* 1,000 lodges, under the control of Sitting Bull." The agency at Fort Peck reports from 6,000 to 7,000 Indians in 1877. We are dealing in this case with a large number of tribal Indians living in a state of incohesiveness, innumerable members hostile to the Government with no intention or desire to disclose their numerical strength, forcing the Indian agents to speculate—except in a few instances—as to how many Indians made up a certain group, and by their conduct creating a degree of confusion and uncertainty that continued until at least the early eighties. *Blackfeet Indian case*, 81 C. Cls. 101.

The inability of the plaintiffs to establish with reasonable certainty the population of the tribe in the early period of the existence of the treaty of 1868, is not the single impediment preventing plaintiffs' recovery. If we could accept the average total population as established, there still remains the process employed to establish the number of school children coming within the treaty provisions for whom schoolhouses and teachers were to be furnished.

The plaintiffs are asking damages for a failure upon the part of the Government to furnish educational facilities for "every thirty children" between the ages of six and sixteen who may be compelled or induced to attend school. The annual number of children fixed by plaintiffs at 5,785 is made inflexible by the computation, and while it is determined upon a census of the Indians and school children for a period of time when peaceable relations prevailed between the Government and the Indians, a period of eight years, i. e., 1881 to 1886, inclusive, and 1888 to 1891, it does not follow in the absence of identical conditions and surroundings that this fixed number of children obtained in the early thirty years of the treaty's existence.

The court must be able from the record to ascertain the extent of the Government's default with respect to educational facilities through the entire forty years, and it is, in our view, impossible to rest a judgment involving as in this case the number of Indian children eligible under the treaty upon the percentage basis offered, ascertained at a time when the serious impediments to education did not exist and the difficulties incident to complying with the treaty had largely disappeared.

The Government was under no treaty obligations to furnish schoolhouses and teachers if pupils could not be compelled or induced to attend school. Assuredly the treaty provisions were not intended to obligate the Government to do a useless thing, and from this record it is impossible to find that, in the early history of the treaty relationships obtaining, anything like 5,785 Indian children of the designated ages were annually available for schooling.

In the *Mille Lac Indian case*, 229 U. S. 498, 500, the Supreme Court said:

> The jurisdictional act makes no admission of liability, or of any ground of liability, on the part of the Government, but merely provides a forum for the adjudication of the claim according to applicable legal principles. Nor does it contemplate that recovery may be founded upon any merely moral obligation, not expressed in pertinent treaties or statutes, or upon any interpretation of either that fails to give effect to their plain import, because of any supposed injustice to the Indians. *United States* v. *Old Settlers*, 148 U. S. 427, 469; *United States* v. *Choctaw, &c., Nations*, 179 U. S. 494, 735 [*sic*]; *Sac and Fox Indians*, 220 U. S. 481, 489.

The court cannot depart from the above established precedent because the difficulties incident to proving damages fall upon the plaintiffs. If we are convinced that the established facts lead inevitably into the realm of conjecture and speculation we are powerless to hazard a finding that a loss, definite and fixed, was suffered because of an alleged default of the Government in observing an article of a treaty. Our opinion is not, as previously observed, founded upon the simple fact that computations involve

estimates. It rests upon the broader legal foundation that the contemporaneous history of the transaction does not admit of establishing that degree of certainty essential to warrant a money judgment for the damages claimed.

The plaintiffs seek to justify the proffered proofs regarding damages suffered, on the ground that the necessity of resorting thereto is chargeable exclusively to the Government's failure to observe its treaty obligations and make a census of the Indian population and eligible school children and its conspicuous guilt in exciting hostilities and Indian wars which resulted in turbulence and prevented the doing of duties imposed by the treaty provisions upon the Government. In other words, under the law the Government is precluded from taking advantage of its own wrongs.

There is no evidence of real probative value in this record that would warrant the court in finding that the Government was responsible for the Indian wars which characterized certain periods of the treaty's existence. It is true that certain reports of Indian agents recite the causes which the Indians said incited war and some historians of the northwest, writing long after the event, ascribe failure upon the part of the Government to observe treaty obligations as responsible for outbreaks. This, however, is a historical controversy which this record does not settle.

What the record does establish is the fact that in 1868 and for many years thereafter the unsettled and chaotic condition of the Sioux Tribe of Indians was such that strict compliance with the treaty of 1868 was an impossibility. The almost insurmountable difficulties which attended the Government's policy of Indian civilization extant in 1868 was present in its contacts with the Sioux Tribe. A large body of Sioux Indians under the leadership of resourceful and intrepid chiefs intent on the settlement of grievances by resort to arms, occasioned a segregation of the tribe to such an extent and under circumstances which precluded the ascertainment of numbers with such a degree of reasonable certainty as warrants a judgment in this case.

Again it is insisted that the damage suffered in this case was the wrong done the Sioux Indians as a tribe and not

alone the children of the tribe. The Sioux Tribe, it is said, ceded a valuable landed estate to the Government as part consideration for the educational facilities set forth in Article VII of the treaty of 1868. Article VII of the treaty was designed to be of mutual benefit. The Government was as much interested as the Indian parents in the education of the Indian children to bring about their civilization.

Is it as a legal proposition possible to ascertain the damages resulting from a failure to receive the elementary education provided for in the treaty? Is the amount allowable to be predicated upon the expense of educating the children? Do not other important factors enter into the issue? The plaintiffs cite statistics compiled in 1930, twenty years after the expiration of the treaty period, when surely schools were available for Indian children in the locality given, wherein the percentage of illiteracy between native-born Whites and Indians is "native Whites (native parentage), North and South Dakota 0.3; Indians, 20.7 and 16.2." Obviously some factor other than available educational facilities must have contributed to this wide divergence.

The ones who suffered substantial damages were the children themselves. Granting that the loss of an English education in its elementary branches might handicap one in his transition from a tribal Indian to the habits, customs, and mode of life of the Whites, how may it be reduced to dollars and cents? Juvenile education might and probably would have had a degree of civilizing influence on the tribe as a whole, but again the measuring of damages, making restitution for an alleged loss in money, is one which in itself resists calculation.

In reaching a conclusion that the failure of the Indians to procure schoolhouses and teachers in the proportion provided for in the treaty occasioned the tribe to be damaged in a huge sum of money, we must entertain too many problematical factors, speculate upon non-proven consequences, and give monetary value to a subject matter that does not lend itself to be valued upon such a basis. This court has had a case quite similar to the present one.

Duwamish Indians v. *United States*, 79 C. Cls. 530, certiorari denied 295 U. S. 755. Quoting from that case, we said (pp. 587–588):

> We search the record in vain for any accurate estimate of the number of persons eligible and willing to attend the schools. In fact, there is some testimony that the parent Indians did not encourage their children to attend. The money value to be placed upon the extent to which the absence of schools impeded the civilization and intellectual development of the tribes must of necessity rest in conjecture without any substantial basis upon which to rest it. The real sufferers are the children of the Indians living in 1859 to 1879; the adults of this generation now living would recoup but a small sum, and the generation who came afterwards the larger part, when as a matter of fact the later generation was generously offered the advantages of education. There is no evidence in the record that the plaintiffs sent their children to other schools and thereby incurred expense. No proof is adduced that funds were expended in building schoolhouses or employing teachers to conduct schools. All the record discloses is as stated. The right which the Indian children lost, deplorable as it may be, was seemingly an intangible one, the right to an education denied them not only by the Government's failure but by the Indians' inability to supply it. This right we think is incapable of being estimated in dollars and cents. It is incontrovertible—Indian history sustains the statement—that in early times the Indian tribes were in no sense partial to schools upon their reservations. Their establishment was a feature of governmental policy, and while in this instance the Government signally failed to observe it, the court is powerless to award a money judgment for such failure, in the complete absence of a substantial basis of fact upon which to predicate it.

A number of cases, both Federal and State, are relied upon by plaintiffs to establish the rule that one party to a bilateral contract who has defaulted in the performance of his obligations may not escape liability for such a default because a perfect measure of damages cannot be established. We will not review the cases, for they do not depart from long established rules of contract law and have been decided

upon the particular facts and circumstances attending each transaction.

It has long been the law that damages may be recovered in cases where a bilateral contract has been breached "even if they cannot be calculated with absolute exactness", but, so far as we have been able to ascertain, the courts have not abandoned the rule that in order to recover damages in cases of the character of the instant case, the plaintiff must prove a reasonable basis for the computations relied upon. The proofs must establish facts which convince the court that the computations, essentially hypothetical in their nature, exclude speculation and conjecture and bear a direct relationship to the amount of damages which should be awarded. "All that the law requires is that such damages be allowed as in the judgment of fair men directly and naturally resulted from the injury for which suit is brought."

Tested by the above rules of law, how may this court hold that the Sioux Tribe of Indians lost a treaty right of the reasonable value of more than eighteen million dollars when the sum claimed is predicated exclusively upon an alleged failure to extend the benefits of a limited education to an uncertain number of juvenile Indians for a limited number of years who will not be reimbursed for such a loss in the event of a judgment in favor of the tribe?

A treaty with tribal Indians undoubtedly creates reciprocal obligations. When the Congress accords the tribe the right to sue thereon and the court is called upon to adjudicate the case, we cannot disregard the conditions obtaining when the treaty was made nor the fundamental intent and purpose of the parties in entering into it, giving of course to the tribal Indians the benefits to which they are entitled when an "unlettered and untutored nation of people" is agreeing with an advanced and civilized race.

It is impossible under certain established conditions, such as confront us in this case, to determine it upon the precise principle contended for by the plaintiffs wherein an express contract involving a stated form of work or labor to be performed, or personal services to be rendered, is breached.

An Indian treaty is of a different character. The treaty of 1868 exemplifies what we mean, and came into being at a time when the Indians had not attained a high degree of civilization. It was a heroic task to induce them to surrender the vast domain over which they had roamed and settle down to agricultural pursuits.

Innumerable Indian cases clearly demonstrate—none in a more pronounced way than this one—that it exacts a long period of time to translate tribal Indians into reservation ones, to bring home to them the advantages of education and civilization, and overcome a native and natural hostility of the tribe towards the Whites whom they regard as trespassers upon their lands. In this case it required thirteen years to bring about peace with Sitting Bull and his numerous followers.

In 1873, five years after the date of the treaty, the Commissioner of Indian Affairs was recommending the establishment of military posts at each of the agencies to enforce respect for their authority and enable the agency affairs to be conducted, and we think it is established by the great preponderance of evidence that it was not until 1881 or thereabouts that the Sioux Tribe as a whole manifested a disposition and intent to inhabit the treaty reservations and embrace the treaty provisions looking towards their care and civilization.

Subsequent to the above date the Indians with commendable zeal turned their attention in a much greater degree to education of Indian children. Nevertheless in 1891 (26 Stat. 1014) we find Congress in the annual Indian bill inserting this provision "* * * the Commissioner of Indian Affairs, subject to the direction of the Secretary of the Interior, is hereby authorized and directed to make and enforce by proper means such rules and regulations as will secure the attendance of Indian children of suitable age and health at schools established and maintained for their benefit", and thereafter the Commissioner did promulgate ten distinct regulations designed to properly administer the statutory provisions. The regulations were general and applied to all Indians, on or off reservations.

Syllabus

From 1881 to 1910 the Indian schools on the Sioux Reservation increased substantially in both attendance and capacity and during the treaty period as extended by the act of 1889 the Government expended the total sum of $7,797,753.83 for the education of the children of the Sioux Tribe. With these established facts before us we cannot with any sustainable degree of reasonableness determine, if otherwise allowable, either the probable number of school children of treaty age annually eligible under the educational provisions of the treaty or compliance by the tribe as a whole with the obligations cast upon it with respect to the same. The existence of a logical basis for the computations insisted upon does not exist. As a matter of fact, we believe the Government furnished in the early history of the treaty school facilities in excess of the demand for them from the Indians themselves.

Plaintiffs' petition will be dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

JAMES V. MARTIN v. THE UNITED STATES

[No. E-374. Decided December 7, 1936]

On Facts and Questions Certified by a Commissioner of the Court

Compensation for use of invention where application for patent therefor placed under secrecy order; forfeiture of application; renewed application and issue of patent thereon; right of action.—The plaintiff, on September 16, 1918, filed an application for patent for aircraft control mechanism, which was placed under a secrecy order by the Commissioner of Patents on October 19, 1918, under the act of October 6, 1917 (40 Stat. 394). Following the signing of the Armistice, the secrecy order was, on January 18, 1919, rescinded, and after further proceedings in the Patent Office, notice of allowance of a patent on the application was given plaintiff on March 15, 1921. Plaintiff, however, permitted the application to become forfeited on September 15, 1921, for nonpayment of the required final fee for issuance of the patent, but subsequently, on January 9, 1923, renewed his application under section

Reporter's Statement of the Case

4897 Revised Statutes, upon which the patent in suit was allowed and was issued to plaintiff on April 29, 1924. Plaintiff's petition, based upon the said act of October 6, 1917, was filed June 10, 1925.

Held: 1. The plaintiff's forfeiture of his original application for patent and the allowance and issuing of the patent on his second or renewed application under section 4897 Revised Statutes, takes the patent from under the act of October 6, 1917, and places it under the provisions of section 4897, which bars recovery for manufacture or use of the invention prior to the issue of the patent.

2. If an inventor's application for patent was placed under a secrecy order under the act of October 6, 1917, and was allowed, he could avail himself of the provisions of the act for compensation for use of the invention by obeying the order, paying the final fee and receiving the letters patent; but if this was not done, his rights and remedies for use of the invention reverted to and were governed by other applicable statutory provisions.

3. The plaintiff cannot recover under the act of October 6, 1917, for infringement, or use of the inventions of his patent, by the Government subsequent to the issuance of the patent on April 29, 1924, any right of action or recovery for such use being under the act of June 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 705).

The Reporter's statement of the case:

Mr. Theodore A. Hostetler for the plaintiff.

Mr. Paul P. Stoutenburgh, with whom was *Mr. Assistant Attorney General George C. Sweeney*, for the defendant. *Mr. J. F. Mothershead* was on the brief.

The Commissioner to whom this case was referred for ascertainment and report certified to the court the following facts and questions:

1. "The plaintiff in this case bases his claim on a petition filed June 10, 1925, solely under the provisions of the act of October 6, 1917 (40 Stat. L. 394, c. 95; U. S. C., title 35, sec. 42), claiming compensation under United States Patent No. 1492304, granted April 29, 1924, for 'Aircraft control mechanism' to him.

2. "The act of October 6, 1917 (40 Stat. L. 394, c. 95), reads as follows:

Reporter's Statement of the Case

"An act to prevent the publication of inventions by the grant of patents that might be detrimental to the public safety or convey useful information to the enemy, to stimulate invention, and provide adequate protection to owners of patents, and for other purposes

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whenever during a time when the United States is at war the publication of an invention by the granting of a patent might, in the opinion of the Commissioner of Patents, be detrimental to the public safety or defense or might assist the enemy or endanger the successful prosecution of the war, he may order that the invention be kept secret and withhold the grant of a patent until the termination of the war: *Provided*, That the invention disclosed in the application for said patent may be held abandoned upon it being established before or by the Commissioner that in violation of said order said invention has been published or that an application for a patent therefor has been filed in a foreign country by the inventor or his assigns or legal representatives, without the consent or approval of the Commissioner of Patents, or under a license of the Secretary of Commerce as provided by law.

"*When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the Commissioner of Patents above referred to shall tender his invention to the Government of the United States for its use, he shall, if and when he ultimately received a patent, have the right to sue for compensation in the Court of Claims, such right to compensation to begin from the date of the use of the invention by the Government.* [Italics Commissioner's.]

3. "On September 16, 1918, the plaintiff, James V. Martin, filed a patent application, serial number 254233, in the United States Patent Office, which application subsequently matured into the patent forming the basis of this suit.

4. "The subsequent history of this application in the Patent Office is as follows: On October 19, 1918, slightly over a month subsequent to the filing of the application, and prior to the first action by the Patent Office, the following order was issued under the provisions of the act of October 6, 1917:

"DEPARTMENT OF THE INTERIOR,
"UNITED STATES PATENT OFFICE,
"*Washington, Oct. 19, 1918.*

"JAMES V. MARTIN,
"(%Barthel & Barthel),
"*Buhl Bldg., Detroit, Mich.*

"Serial No. 254233. Filed Sept. 16, 1918. For aircraft control mechanism by assignees

"NOTICE AND ORDER

"*To James V. Martin, his assignees, his heirs, and all his agents:*

"Under the provisions of the act of October 6, 1917 (Public, No. 80:234, O. G., 797), you are hereby notified that your application as above identified has been found to contain subject matter which might be detrimental to the public safety or assist the enemy in this present war, and you are hereby ordered to in nowise publish the invention or disclose the subject matter of said application, except that the invention may be disclosed to officials of the War and Navy Departments of the United States, but to keep the same secret during the period of the present war (unless written permission is first obtained of the Commissioner of Patents), under the penalty of the invention being held abandoned. This application must be prosecuted under the Rules of Practice until a notice is received from the Office that the case is in condition for allowance. When the application is in condition for allowance it will be withheld from issue during the period of the war, unless this order is hereinafter rescinded; furthermore, if previously allowed and now withdrawn, the prosecution of the case is likewise closed; except under provisions similar to those set forth in rule 78. No amendment will be considered.

"Your attention is also called to the provisions of section 16 of the Trading with the Enemy Act of October 6, 1917 (Pub., No. 91).

"This order should not be construed in any way to mean that the Government has adopted or contemplates adoption of the alleged invention disclosed in this application, nor is this order any indication of the value of such invention.

"Upon petition to the Commissioner, permits authorizing disclosure to parties of undoubted loyalty may

be made for the purpose of developing and exploiting the invention, such parties being named in the petition.

"254233. "(S.) J. T. NEWTON,
"Commissioner.

"On December 27, 1918, the Patent Office acted upon the application, rejecting some claims and holding certain other claims in the case allowed.

"On January 18, 1919, the following rescinding order was issued in the patent:

"DEPARTMENT OF THE INTERIOR,
"UNITED STATES PATENT OFFICE,
"Washington, Jan. 18, 1919.

"RESCINDING ORDER

"Appl. James V. Martin. Filed Sept. 16, 1918. Ser. No. 254233. Aircraft control mechanism

"The order of the Commissioner dated Oct. 19, 1918, preventing disclosures or publication of the subject matter of the above-entitled application during the period of the war issued to the applicant and other parties of record is hereby rescinded and the application is before the examiner for further action or for allowance.

"254233. "(S.) J. T. NEWTON,
"Commissioner.

"On December 9, 1919, shortly after the Armistice, the Official Gazette of the United States Patent Office published the order of the Federal Trade Commission releasing all applications pending in the Patent Office from the order of secrecy.

"On March 15, 1921, the Patent Office issued a notice of allowance of all the claims contained in the application which notice of allowance permitted the applicant to pay the final fee and have the patent issued within three months from the date of said payment.

5. "The applicant elected not to pay the final fee within six months after date of notice of allowance but allowed the patent application to become forfeited. Within the two-year period permitted by statute, plaintiff, James V. Martin, filed a renewal application on January 9, 1923, under

the provisions of R. S. 4897 (U. S. C., title 35, sec. 38), which reads as follows:

> "38. Renewal of application in cases of failure to pay fees in season.—Any person who has an interest in an invention or discovery, whether as inventor, discoverer, or assignee, for which a patent was ordered to issue upon the payment of the final fee, but who fails to make payment thereof within six months from the time at which it was passed and allowed and notice thereof was sent to the applicant or his agent, shall have a right to make an application for a patent for such invention or discovery the same as in the case of an original application. But such second application must be made within two years after the allowance of the original application. *But no person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent.* And upon the hearing of renewed applications preferred under this section, abandonment shall be considered as a question of fact. [Italics Commissioner's.]

6. "The Patent Office issued a second notice of allowance on March 21, 1924, which contained the original twenty-eight claims of the notice of allowance of March 15, 1921, and thirteen additional claims, being the total number of forty-one claims now contained in the patent. The applicant paid the final fee required by the Patent Office and the patent was granted on April 29, 1924, a period of one month and eight days from the date of the second notice of allowance.

"The responses of the War and Navy Departments to calls of this court based upon the motions filed by the plaintiff, include aeroplane constructions used by the Government during the following periods:

"1. Prior to the filing date of the patent in suit;

"2. Between the filing date of the application for patent in suit and the issue date of the secrecy order;

"3. Between the date of issuance of the secrecy order and the date of revocation of the secrecy order;

"4. Between the date of revocation of the secrecy order and the date of forfeiture of the application;

"5. Between the date of forfeiture of the application and the issuance of the patent;

"6. Between the issuance of the patent and the filing of the petition in the above-entitled case; and

"7. Subsequent to the filing of the petition in the above-entitled case.

"The taking of proof and the presentation of testimony by the parties relative to all of these alleged uses by the Government would necessitate a voluminous and expensive record and would involve holding extensive hearings by the Commissioner.

"It, therefore, appears that the determination of certain questions of law by the court relative to the scope of the last paragraph of the act of October 6, 1917, will expedite the disposition of this case. This paragraph reads as follows:

> "When an applicant whose patent is withheld as herein provided and who faithfully obeys the order of the Commissioner of Patents above referred to shall tender his invention to the Government of the United States for its use, he shall, if and when he ultimately receives a patent, have the right to sue for compensation in the Court of Claims, *such right to compensation to begin from the date of the use of the invention by the Government.* [Italics Commissioner's.]

"Testimony on behalf of the parties relative to obeyance of the secrecy order and tender has not been completed.

"QUESTIONS CERTIFIED

"1. Does the fact that plaintiff permitted his application to forfeit after notice of the allowance of March 15, 1921, and elected to file a renewal application under the provisions of R. S. 4897, take the patent in suit from under the provisions of the act of October 6, 1917, and place it under the provisions of R. S. 4897, which reads in part as follows:

> "But no person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent.

"2. Does the fact that plaintiff elected to wait more than six years after the Patent Office issued its order of January 18, 1919, rescinding its secrecy order of October 19, 1918,

before filing the petition in this case bar recovery for use prior to April 29, 1924, the date of issuance of the patent in suit under the statute of limitations?

"3. Does the act of October 6, 1917 (40 Stat. L. 394, c. 95), permit the plaintiff to charge infringement of and recover for structures in use by the United States solely subsequent to his forfeiture of the application, namely, on September 15, 1921, and prior to the renewal of the application on January 9, 1923?

"4. Does the act of October 6, 1917 (40 Stat. L. 394, c. 95), permit the plaintiff to charge infringement of and recover for structures in use by the United States solely subsequent to the renewal of the application for patent on January 9, 1923, and the issuance of the patent on April 29, 1924?

"5. Does the act of October 6, 1917 (40 Stat. L. 394, c. 95), permit the plaintiff to charge infringement of and recover for structures in use by the United States solely subsequent to the issuance of the patent, namely, April 29, 1924?

"6. Does the act of October 6, 1917 (40 Stat. L. 394, c. 95), permit the plaintiff to charge infringement of and recover for structures in use by the United States solely subsequent to the issuance of the patent on April 29, 1924, and prior to the filing of the petition in the Court of Claims on June 10, 1925, or must such claim be made under the act of June 25, 1910, as amended by the act of July 1, 1918 (40 Stat. 705)?

"7. Does the act of October 6, 1917 (40 Stat. L. 394, c. 95), permit the plaintiff to charge infringement of and recover for structures in use by the United States solely subsequent to the filing of the petition in the above-entitled case, namely, June 10, 1925?

"8. In a suit under the act of October 6, 1917 (40 Stat. L. 394, c. 95), is the period of use for which recovery may be had limited between the date of issuance of the secrecy order, namely, October 19, 1918, and the date of issuance of the rescinding order, namely, January 18, 1919?

"9. Does the act of October 6, 1917 (40 Stat. L. 394, c. 95), permit the plaintiff to charge infringement of and recover for structures in use by the United States prior to the filing date of the application for the patent in suit, namely, September 16, 1918?

"10. Does the act of October 6, 1917 (40 Stat. L. 394, c. 95), permit the plaintiff to charge infringement of and recover for structures in use by the United States between the filing date of the application for patent in suit, namely, September 16, 1918, and the issuance of the secrecy order, namely, October 19, 1918?

"11. Does the act of October 6, 1917 (40 Stat. L. 394, c. 95) permit the plaintiff to charge infringement of and recover for structures in use by the United States solely between the issuance of the order of January 18, 1919, rescinding the secrecy order of October 19, 1918, and the date of forfeiture of the application, namely, on September 15, 1921?

"It is respectfully requested that the court give appropriate instructions on the above questions for the guidance of the Commissioner in the further progress of the case.

"Respectfully submitted.

"HAYNER H. GORDON,
"*Commissioner.*"

BOOTH, *Chief Justice*, delivered the opinion of the court:

The agreed statement of facts certified to the court for answer develops two questions of law of prime importance to plaintiff's case. As we view the case stated, the court's answers to the first, second, and sixth questions determine the issue raised.

Plaintiff's petition alleges a cause of action under the act of October 6, 1917 (40 Stat. 394, c. 95), predicated upon an alleged infringement of his letters-patent for an aircraft control mechanism issued to him on April 29, 1924, under the provisions of R. S. 4897 (U. S. C., Title 35, Sec. 38). The acts mentioned are set forth in the agreed statement of facts and hence not repeated in this opinion.

The plaintiff's first application for a patent covering the mechanism involved was filed in the Patent Office on September 16, 1918. The then Commissioner of Patents very soon after the filing of the application, acting in pursuance of the authority conferred upon him by the act of October 6, 1917, *supra*, issued the secrecy order appearing in Finding IV. Later, on January 18, 1919, the secrecy order was rescinded by the Commissioner, and on March 15, 1921,

plaintiff's patent application embracing all claims was allowed and all that remained for the plaintiff to do to procure the issuance of letters-patent was to pay the final fee exacted under the patent law. This he did not do and consequently voluntarily allowed his patent application to become forfeited.

Subsequently on January 9, 1923, plaintiff filed under R. S. 4897, *supra*, a renewal application as he concededly had a legal right to do, and this application was allowed, embracing forty-one claims and passed to patent April 29, 1924. The parties to the litigation submit to the court the legal questions involved prior to the taking of testimony before the Commissioner for the obvious reason that the taking of testimony would involve great expense to both parties to the case.

The plaintiff contends that inasmuch as his original cause of action arose under the act of October 6, 1917, upon which he solely relies, he did not lose this right when his patent application filed under that act was forfeited, because under the provisions of R. S. 4897 he possessed the right within two years to file a renewal application involving the same invention and having done this precise thing and ultimately received letters-patent he is entitled to sue under the act of October 6, 1917.

In argument to sustain the above contention plaintiff emphasizes the point that under established law an inventor possesses the right to avail himself of all statutory privileges relating to the procurement of patent rights, and so long as he keeps within the same his rights are in nowise prejudiced, notwithstanding they originated under one statute and are prolonged under another one. A continuity of statutory rights is insisted upon, procedural rights in many respects which serve to give to a patent application the character of indivisible proceedings, i. e., what takes place subsequent to the allowance of the original application is simply a continuance of prosecuting the same through the Patent Office and no more than the final step essential to procuring the issue of letters-patent which would have been issued at an earlier date except for the happening of the act which caused the delay, and hence patent rights do ac-

crue under the act in force at the time the original application was filed.

This court has had a number of cases before it directly involving the act of October 6, 1917; they do not throw much light upon the issues of this case and we will not refer to them specifically. We cite them in the margin [1] and from them repeat the construction given to the statute, i. e., its scope and intent. We are now only concerned with the legal proposition as to whether the plaintiff has a cause of action under the act, having received his letters-patent in virtue of R. S. 4897.

The war act of October 6, 1917, was a remedial statute. It enlarged a patentee's rights with respect to the date when infringement of the same began because of the exercise of emergency authority granted the Commissioner by Congress. For a stated period, Congress waived for the Government the right upon its part to escape liability for infringement of a citizen's patent until subsequent to the grant to him of a patent, and consented if liable to respond in damages as of and from the date of infringement and not the date of the patent.

The words "if and when he ultimately received a patent", which precede the conferring of jurisdiction upon this court to award just compensation in cases established under the act, have exclusive reference to cases arising under the act and comprehend the granting of delayed letters-patent, delayed because of secrecy orders and the impounding of the application in such a way as to render the date of issue problematical. The governmental situation was critical. Nevertheless, the rights of inventors were to be taken care of.

The Commissioner possessed the undoubted authority to withhold the grant of a patent, notwithstanding the usual procedure of perfecting and prosecuting an application therefor obtained. If an inventor whose application had been allowed desired to avail himself of the beneficial pro-

[1] *Wm. A. Zeidler* v. *United States*, 61 C. Cls. 520; *Id.* 537;
Rodman Chemical Co. v. *United States*, 65 C. Cls., 39, certiorari denied 277 U. S. 592;
Carl G. Allgrunn v. *United States*, 67 C. Cls. 1; *Ordnance Engineering Corporation* v. *United States*, 68 C. Cls. 301;
Emil Gathmann v. *United States*, 71 C. Cls. 680.

visions of this exceptional act, all that he needed to do was to obey the order of the Commissioner of Patents with respect to secrecy, pay the final fee, and receive letters-patent. If this was not done his rights reverted as in this instance to other statutory provisions remedial in their nature.

In order words, the intent and purpose of the act of October 6, 1917, was to compensate in a measure the patentee for a possible injury and loss of damages due to a necessary act of the Government, whereas, under R. S. 4897, the applicant whose application has been allowed is granted the privilege of obtaining letters-patent at a later date under specified limitations wherein the delay in securing the same is due to his own remissness.

Failure to pay the prescribed final fee was not regarded to be of such a serious consequence as to bar the applicant from ever receiving letters-patent based upon a previously allowed application and Congress remedied the situation by granting the right to renew such an application within two years after the allowance of the original one. The right of renewal was not unconditional.

The renewal act provided "But no person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent." The significance of this provision is found in the fact that under the renewal act patent rights accrue from the date of the issuance of the patent as provided in the act, and under no other act.

What we mean is that while the condition imposed may include a statement of established patent law, it was inserted to emphasize the fact that as to any infringement of patent rights the same must follow the granting of a patent upon the renewal application. So far as damages for infringement are concerned, the act had no *ex post facto* effect and could have none, no matter from what source previous patent rights arose. The renewal act, R. S. 4897, grants a remedy in accord with its provisions, and bears no relation whatever to the act of October 6, 1917, so far as suits against the Government are involved.

The act of October 6, 1917, covers in terms a particular state of facts operative only when the country is at war, and the essence of the remedy granted lies in a possible and contemplated delay upon the part of the Government in issuing a patent. Congress did not intend to extend its privileges to the voluntary abandonment of the rights conferred, or in instances where a patentee failed to take advantage of the law.

This act grants a specific right to sue the Government, and provides the terms and conditions upon which such a suit may be brought.

The plaintiff did not receive letters-patent until April 29, 1924, more than three years after the allowance of his original application. The patent monopoly he acquired was granted under R. S. 4897 which accorded to him the privilege of filing a second application "the same as in the case of an original application" and prosecuting the same through the Patent Office.

The act of October 6, 1917, was designed and intended for a special purpose to meet an emergency. The legislation embraced in R. S. 4897 was intended to grant an additional remedy in patent procedure, and a suit against the Government may not be predicated upon both acts under the existing facts and circumstances of this case. The act of 1910, (36 Stat. 851), as amended in 1918, affords a remedy by allowing suits against the Government when a patentee has received his letters-patent and the Government is charged with infringement, and the plaintiff did not receive letters-patent until 1924. Hence, his remedy is under the foregoing statutes.

To the first two questions the court answers "Yes." Answering question six, plaintiff's right, if any legally exists, to sue the Government is given by the act of June 25, 1910, as amended by the act of July 1, 1918 (40 Stat. 705). Response to the above questions by the court renders it unnecessary to answer the remaining ones. We think the answers given determine the issue presented.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

Reporter's Statement of the Case

THE GLENN L. MARTIN COMPANY, A CORPORATION, v. THE UNITED STATES

[No. H-285. Decided December 7, 1936]

On the Proofs

Contract for airplanes; consideration for contingent additional compensation.—Where a contract for designing and production by the plaintiff of a number of airplanes of a particular type for the Government provided that as a further consideration for the planes in addition to the fixed base price specified in the contract the Government should pay the plaintiff certain percentages of the prices or cost of any planes of the same design thereafter manufactured by or for the Government, there was a sufficient consideration for such contingent additional compensation.

Contingent fee, validity of.—A contingent fee to a contractor is valid where there has been a valuable consideration therefor and the contractor has performed his part of the contract.

The Reporter's statement of the case:

Mr. Robert A. Littleton for the plaintiff. *Mr. Guy Mason* and *Mason, Spalding & McAtee*, were on the brief.

Mr. Frank J. Keating, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation of the State of Ohio, with principal office and place of business in the City of Baltimore, State of Maryland. It was organized in 1917 and has always been engaged in the manufacture of aircraft.

2. Plaintiff, through its proper officers, and defendant, by its contracting officer, R. H. Fleet, Major, Air Service, U. S. Army, under date of June 9, 1920, entered into a contract known as Contract No. 277. A copy thereof is attached to the petition as Exhibit A, and is made part hereof by reference.

3. Under contract No. 277 the plaintiff agreed for the sum of $1,003,737.50 to (1) design, construct, assemble, and deliver to the defendant 20 new type Martin Bombing airplanes (known as the GMB-2), in accordance with speci-

fications furnished by defendant, and (2) furnish and deliver to the defendant a complete set of clear and legible working, paper vandykes of the first airplane, a final analysis of design, a complete set of clear and legible working, paper vandykes, and a bill of material of the twentieth or last airplane, said sum of $1,003,737.50 payable $998,-737.50 in specified installments ending upon acceptance of the last airplane and the remaining $5,000 upon acceptance of the final analysis of design, complete set of working, paper vandykes, and bill of material of the twentieth airplane; and (3) at stated unit prices which amounted eventually to $181,559.85, construct, assemble, and deliver to the defendant certain spare parts for said airplanes, a total fixed consideration of $1,185,297.35.

The contract defined the term "complete set of working, paper vandykes" as a clear and legible set of vandykes or tracings of the final drawings from which the airplane has been constructed, to a definite scale, and of such a nature that a constructor of airplanes could reproduce the airplane in limited quantities.

In addition to the fixed consideration of $1,185,297.35 (Article V of the contract) there was provided in Article VI a contingent consideration as follows:

> (2) (a) It is understood by both parties hereto that the consideration named in Article V hereof is not of itself sufficient to induce the Contractor to undertake the work herein contracted for, without the possibility of additional remuneration from the Government. It is therefore agreed that one of the considerations of this Contract is said element of possibility of additional remuneration, which is, at the same time, calculated to afford every encouragement to the Contractor to expend its best efforts to make the articles herein contracted for so superior to the contract requirements that a material contribution will thus be made to the science and art of Aviation and as the result of which the Government will consider it advisable to reproduce such articles in quantity. The Government therefore [sic] agrees that should it, after the delivery and acceptance of the articles herein contracted for, manufacture, or have manufactured for it, additional articles of such design, it will pay the herein-named Contractor an amount equal to two percent (2%) of the price paid by

the Government for the first fifty of such articles, one and one-half percent (1½%) of the price paid for the second fifty of such articles, and one percent (1%) of the price paid for all other such articles; provided, that the aggregate of all such payments shall in no event exceed $50,000. (In the event of Government manufacture, the manufacturing cost shall be used as the basis upon which to compute these percentages instead of the contract price.) Such payments shall also constitute full and final compensation for, and shall be in full satisfaction of, all claims and demands of the Contractor against the Government or those acting for the Government as agent, contractor, or otherwise arising out of or by reason of, the use or infringement of patents and/or other rights, if any, of the Contractor, or those in privity with the Contractor affecting the manufacture, use, or sale of such additional articles.

4. The original contract was modified by supplemental agreements as follows:

(1) On February 17, 1921, the defendant issued a purchase order on plaintiff for 20 ignition switches for $1,500.

(2) On March 31, 1921, by Contract 277–S, the contractor agreed to change the last ten airplanes to provide for the carrying and release of additional armament, for an additional consideration of $44,550.

(3) On November 28, 1921, by Contract 277–S–1, the contractor agreed to numerous changes, for a further additional consideration of $16,824.81.

5. All the agreed work was done and materials furnished by plaintiff, and accepted by the defendant, and plaintiff was paid the total fixed consideration of $1,248,172.16.

On March 25, 1922, the parties hereto entered into a settlement agreement, which, after reciting the existence of the original and supplemental contracts and that the Contractor had satisfactorily completed the performance of them, and the Government had received, inspected, and accepted all the articles provided therefor and had made settlement in full therefor, stated as follows:

Now, therefore, in consideration of said Contractor's hereby acknowledging satisfaction in full of any and all claims, both formal and informal, of whatsoever nature

arising under or by virtue of, or in connection with said Contracts 277, 277–S and 277–S–1, and all orders issued thereunder and hereby binding itself and its successors and assigns, to save harmless the Government from any and all claims of every kind or character whatsoever, both formal and informal, for material or labor furnished or expenses or obligations incurred, on account of said Contracts 277, 277–S and 277–S–1, and all orders issued thereunder, the Government hereby acknowledges full and complete performance on the part of said Contractor, of said Contracts 277, 277–S and 277–S–1, and all orders issued thereunder, except that the provisions of Article VI of said Contract 277, are not hereby terminated but remain in full force and effect.

6. Under dates of May 5, 1921, June 29, 1921, and February 27, 1922, defendant contracted with Ernest C. Whitbeck, receiver of the L. W. F. Engineering Co., with the Curtiss Airplane and Motor Co., and with the Aeromarine Plane & Motor Co., respectively, for the construction of additional Martin Bombing Airplanes, and at the same time furnished them each with a complete set of the working, paper vandykes, analysis of design, and bill of material of the GMB–2 Martin Bombing Airplane, along with one of the first six airplanes constructed for and delivered to defendant, under Contract No. 277 as amended. These three contractors made and delivered to defendant, and defendant accepted, Martin Bombing Airplanes, of the GMB–2 design, in number and for sums as follows:

	Number	Amount
Whitbeck, receiver	35	$808,500
Curtiss A. & M. Co.	50	945,000
Aeromarine P. & M. Co.	25	523,750
Total	110	2,277,250

7. On July 15, 1922, plaintiff and defendant entered into a written contract, No. 277–T–1, whereby the defendant agreed to pay forthwith to plaintiff and plaintiff agreed to accept, in full payment of the appropriate proportion of the contingent consideration named in Contract No. 277, the sum

of $3,234, being two percent of the contract price, $161,700, to Whitbeck, receiver for the first seven airplanes made and accepted under his contract.

A copy of Contract No. 277–T–1 is filed as plaintiff's Exhibit No. 5, and is made part hereof by reference.

8. Upon execution of Contract No. 277–T–1 plaintiff submitted to defendant its invoice and claim for the aforesaid sum of $3,234.

This invoice and claim was approved by the defendant's contracting officer, on October 19, 1922, disapproved by the Assistant Chief, Finance Section, Air Service, War Department, and on October 21, 1922, forwarded by the Chief of Finance, Air Service, War Department, to the General Accounting Office for review.

It was disallowed by the Comptroller General February 7, 1923, upon reconsideration allowed September 20, 1923, and on April 4, 1924, paid, on Jan. 13, 1925, again disallowed by the Comptroller General, and thereafter the amount thereof was by his direction withheld from other sums due plaintiff and is still withheld.

9. By February 8, 1924, all the Martin Bombing Airplanes called for by the three contracts heretofore mentioned, with contractors other than plaintiff, had been made by them and accepted by the defendant.

Shortly prior thereto, viz, on January 15, 1924, plaintiff submitted to defendant its invoice and claim for royalties of $35,337.25 due under Article VI of Contract No. 277 on the remaining 103 airplanes.

On May 20, 1924, the Comptroller General allowed the claim for $35,337.25 and notified plaintiff accordingly. Thereafter, January 13, 1935, the Comptroller General reversed his allowance, and the claim has not been paid.

10. There is no evidence that the defendant or any of its officers have taken any steps to set aside the settlement made of Contract No. 277 or to deny the validity of the settlement, except as to Article VI thereof in relation to contingent consideration, and no convincing proof has been submitted that plaintiff did not satisfactorily complete the performance of Contract No. 277 as amended.

The GMB-2 airplane developed and produced under Contract No. 277 had as an essential element a releasing mechanism for heavy bombs, with structural members in the body of the airplane adapted therefor, not theretofore existing, and plaintiff's efforts under the contract constituted a material contribution to the science and art of aviation as related to airplanes for bombardment purposes.

The court decided that plaintiff was entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

This is a suit on an express contract to recover the sum of $38,571.25. The plaintiff entered into a contract with the defendant on June 9, 1920, whereby it agreed for the sum of $1,003,737.50 to (1) design, construct, assemble, and deliver to the defendant 20 new type Martin bombing airplanes (known as the GMB-2), in accordance with specifications furnished by the defendant; (2) furnish and deliver a complete set of clear and legible working, paper vandykes of the first airplane, a final analysis of design, a complete set of clear and legible working, paper vandykes, and a bill of material of the twentieth airplane; all of the above-mentioned sum was to be paid upon the acceptance of the last airplane saving and excepting $5,000 which was to be paid upon acceptance of the final analysis of design, complete set of working, paper vandykes, and bill of material of the last airplane; and (3) at stated unit prices which amounted eventually to about $182,000 to construct, assemble, and deliver certain spare parts for said airplanes.

The contract defined the term "complete set of working, paper vandykes" as a clear and legible set of vandykes or tracings of the final drawings from which the airplane has been constructed, to a definite scale, and of such a nature that a constructor of airplanes could reproduce the airplane in limited quantities.

In addition to the sums above mentioned to be paid the contractor (Article V) there was provided in Article VI a contingent fee reading as follows:

(2) (a) It is understood by both parties hereto that the consideration named in Article V hereof is not of

itself sufficient to induce the Contractor to undertake the work herein contracted for, without the possibility of additional remuneration from the Government. It is therefore agreed that one of the considerations of this Contract is said element of possibility of additional remuneration, which is, at the same time, calculated to afford every encouragement to the Contractor to expend its best efforts to make the articles herein contracted for so superior to the contract requirements that a material contribution will thus be made to the science and art of Aviation and as the result of which the Government will consider it advisable to reproduce such articles in quantity. The Government therefore [sic] agrees that should it, after the delivery and acceptance of the articles herein contracted for, manufacture, or have manufactured for it, additional articles of such design, it will pay the herein-named Contractor an amount equal to two percent (2%) of the price paid by the Government for the first fifty of such articles, one and one-half percent (1½%) of the price paid for the second fifty of such articles, and one percent (1%) of the price paid for all other such articles; provided, that the aggregate of all such payments shall in no event exceed $50,000. (In the event of Government manufacture, the manufacturing cost shall be used as the basis upon which to compute these percentages instead of the contract price.) Such payments shall also constitute full and final compensation for, and shall be in full satisfaction of, all claims and demands of the Contractor against the Government or those acting for the Government as agent, contractor, or otherwise, arising out of or by reason of, the use or infringement of patents and/or other rights, if any, of the Contractor, or those in privity with the Contractor, affecting the manufacture, use, or sale of such additional articles.

The original contract was supplemented by other agreements which in no way affect the contract under consideration and only added to the increased compensation which the contractor would receive for furnishing articles not mentioned in the contract.

The plaintiff completed all the work called for by the contract and the 20 airplanes were accepted and full payment has been received by the plaintiff for the planes produced by it and $5,000 for the delivery of the vandykes or tracings for the final drawings.

In the years 1921 and 1922 the defendant contracted with three airplane companies for the construction of Martin Bombing airplanes and at the same time furnished them each with a complete set of working, paper vandykes, analysis of design, and bill of material of the GMB-2 Martin Bombing airplanes together with one of the first six airplanes constructed for and delivered to the defendant by the plaintiff under the contract in this suit. The defendant received from these contractors 110 airplanes for which it paid the sum of $2,277,250.00. The plaintiff made claim under Article VI for the percentage it was entitled to receive on the manufacture of airplanes according to its design, plan, and drawings and the matter was submitted to the Comptroller General who first approved and then disapproved the payment of this claim.

The sole question for decision in this case is whether the plaintiff is entitled to recover the contingent fee when it has shown that the conditions under which it was payable have been fulfilled, viz, that it has completed its original contract and the Government has used its design and drawings in the manufacture of a large number of other planes. The amount is not in controversy. The Government contends that there was failure of consideration for this contingent fee, the plaintiff having received payment for the planes manufactured by it and also for its designs. It is needless to say that if the Government's contention is correct there can be no recovery. The answer to the assertion of lack of consideration is stated in the contract itself and in the very Article under consideration. It is there plainly set out that the consideration was the manufacture of the 20 airplanes and the designing and drawing of the vandykes, etc., was insufficient "to induce the contractor to undertake the work herein contracted for, without the possibility of additional remuneration from the Government." It is further stated as one of the considerations of the contract that this additional remuneration is "calculated to afford every encouragement to the contractor to expend its best efforts to make the articles herein contracted for so superior to the contract requirements that a material contribution will thus be made to the science and art of aviation

and as the result of which the Government will consider it advisable to reproduce such articles in quantity." The Government was experimenting in airplane designs and was desirous of procuring a design of a bombing plane which could be manufactured in quantity production. The facts show that the Government did consider the articles such a material contribution to the science and art of aviation and so satisfactory that it ordered and had reproduced over 100 planes from the design and vandykes which were furnished by the plaintiff. The very wording of this article shows that it was a part and parcel of the consideration of the contract, and, if it had not been agreed to, the Government would probably have had to pay a much higher price for the planes manufactured by the plaintiff. There is no question of royalty involved. There is no claim that the design or any part thereof was patented. The claim is one under contract, and the Government has received the benefits and now refuses to pay. It has been held by this court that a contingent fee is valid where there has been a valuable consideration therefor and the contractor has performed his part of the contract. *F. Jacobson & Sons* v. *United States*, 61 C. Cls. 420; and *Cohen, Endel & Co.* v. *United States*, 60 C. Cls. 513.

The plaintiff is entitled to recover the sum of $38,571.25. It is so ordered.

WILLIAMS, *Judge*; GREEN, *Judge*; and BOOTH, *Chief Justice*, concur.

LITTLETON, *Judge*, did not hear this case and took no part in its decision.

H. V. KELL COMPANY, A CORPORATION v. THE UNITED STATES

[No. M-41. Decided December 7, 1936]

On the Proofs

Income and profits tax; collection stayed by claims in abatement; collection of tax after statute of limitation had run; section 611, Revenue Act of 1928.—Under the provisions of section 611 of the Revenue Act of 1928, a payment in January 1926, after the expiration of the statutory period for collection, of a portion of

the income and profits taxes assessed against the plaintiff for the year 1917 the collection of which had been stayed by claims in abatement filed by plaintiff, was not an overpayment recoverable by plaintiff under the provisions of section 607 of said act.

Same; statute of limitations.—Where the filing of the plaintiff's claims in abatement resulted not only in staying collection, but also in obtaining a reduction of the taxes, the plaintiff is in no position to claim the benefit of the statute of limitations where collection of the tax was made after the bar of the statute had fallen.

The Reporter's statement of the case:

Mr. Francis R. Lash for the plaintiff. *Mr. Francis C. Stetson* was on the briefs.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

Plaintiff is a corporation and on April 24, 1918, filed a return for its income and excess profits taxes of 1917 disclosing total taxes due of $31,833.69. No part of the taxes shown to be due was paid but a claim of abatement was filed on the same day covering the full amount of taxes reported. On May 16, 1918, plaintiff filed amended returns disclosing total taxes due of $9,676.53, which were paid on June 22, 1918. The same day the amended returns were filed, plaintiff filed a second claim for abatement in the amount of $22,157.16. On May 23, 1918, plaintiff filed second amended returns disclosing total taxes due for 1917 in the amount of $9,909.21 and on the same day plaintiff filed a third claim for abatement in the amount of $21,924.48. The amounts of taxes shown due on the original and first amended returns were assessed, making total original assessments of $41,510.22.

The three claims of abatement above referred to asked to have plaintiff's taxes assessed under the special relief provisions of section 210 of the revenue act of 1917 and on November 6, 1918, the Commissioner of Internal Revenue assessed plaintiff's taxes under these provisions and determined the amount due to be $24,881.39. Plaintiff's second claim for abatement was allowed on November 14, 1919, in

the sum of $16,628.83 and rejected for $5,528.33. Plaintiff's first claim for abatement was rejected in full on November 19, 1919, and its third claim was rejected in full on May 7, 1920.

Based on a revenue agent's report dated June 23, 1920, disclosing a tax liability of $42,044.50, the Commissioner of Internal Revenue on March 24, 1921, assessed a deficiency for 1917 in the amount of $17,163.11. On April 9, 1921, plaintiff filed its fourth claim in abatement covering the full amount of the additional assessment and the disallowance of a portion of the salaries paid. This claim was rejected April 25, 1922.

On April 18, 1922, plaintiff filed an application for extension of time to pay the deficiency assessed and the 1917 taxes were redetermined under the special assessment provisions and the liability fixed at $30,101.17, thus showing an over-assessment of $11,943.33 which was abated December 21, 1922, and on January 22, 1923, plaintiff paid the balance of the additional assessment in the amount of $5,219.78. After a series of conferences with the Bureau of Internal Revenue, on September 16, 1925, plaintiff filed a waiver of the statute of limitations operative by its terms to December 31, 1926. This waiver never was signed by the Commissioner of Internal Revenue. On receipt of the waiver, the Commissioner reopened for further consideration plaintiff's fourth claim for abatement and November 13, 1925, allowed this claim in the sum of $5,500.86 and rejected it for $11,662.25. This was based on a determination of the total tax for 1917 under the special assessment provisions at $24,600.31. The assessment of $5,500.86 was abated on a schedule dated December 4, 1925. The unpaid balance of taxes due for the year 1917 in the amount of $9,704 was paid by the plaintiff on January 27, 1926. A claim for refund based on the allegation that the collection was barred when made was filed March 15, 1927, and was rejected November 5, 1927.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

Plaintiff brings this suit to recover $9,704 taxes assessed for the calendar year 1917 and not paid until January 27, 1926, when it is alleged collection was barred by the statute of limitations.

The findings show that plaintiff filed four claims for abatement of its taxes for 1917. The first three claimed the right to assessment of its taxes under the special relief provisions of section 210 of the revenue act of 1917. The fourth referred to a deficiency of $17,163.11 and the disallowance of a portion of the salaries paid. Thereafter, plaintiff's tax liability for 1917 was redetermined under the provisions of section 210 of the revenue act of 1917 and an overassessment determined which was abated on a schedule dated December 21, 1922. As plaintiff still disputed the amount of its tax liability for 1917, the representatives of plaintiff and defendant in 1925 held conferences with reference to it. On September 16, 1925, plaintiff executed a collection waiver which provided it was to remain in effect until December 31, 1926, but which was never signed by the Commissioner. Shortly after the filing of the waiver, plaintiff was advised in substance that the claim for the abatement of $17,163.11 for 1917 would be reopened for further consideration, and on November 13, 1925, plaintiff was further advised as a result of a redetermination of its tax liability under section 210 of the revenue act of 1917 that its claim for abatement of $17,163.11 would be rejected for $11,662.25 and allowed for $5,500.86. This allowance was based on a determination of plaintiff's total tax under the assessment provisions of section 210 at $24,600.31. The amount allowed was abated on a schedule of these proceedings dated December 4, 1925. The balance of the original tax assessed but unpaid for 1917 in the amount of $9,704 was paid by plaintiff on January 27, 1926, pursuant to notice and demand.

It is quite clear that this case comes under section 611 of the revenue act of 1928 providing that where a claim in abatement was filed and the collection of any part of the tax stayed the payment of such part "shall not be considered as

an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection." The meaning of this provision is so clearly explained by the Supreme Court in *Graham & Foster* v. *Goodcell*, 282 U. S. 409, as to require nothing further.

It is contended on behalf of plaintiff that it was not disputing all of the tax but only a special part thereof and the portion of the tax which was paid was not included therein. Plaintiff made different claims, but the action of the Commissioner was stayed under all of them. In the first three claims for abatement he was requested to apply the provisions of section 210 of the revenue act of 1917 and he did so. The fourth claim for abatement applied to the deficiency alone. But none of these claims could be or were determined until a calculation had been made of all of plaintiff's taxes and the final computation and determination were not made until December 4, 1925. All of this delay resulted from the action of plaintiff in filing these claims for abatement. Not only was the collection of the tax "stayed" within the meaning of the law by the filing of the last claim in abatement but plaintiff obtained a reduction in its tax thereby and is now in no position to claim the benefit of the statute of limitations.

What is said above renders it unnecessary to consider whether the waiver filed was valid. The petition of plaintiff must be dismissed and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

PENNSYLVANIA-DIXIE CEMENT CORPORATION v. THE UNITED STATES

[No. M-77. Decided December 7, 1936]

On the Proofs

Income and profits tax; validity of waiver; delegation of Commissioner's authority to sign waiver.—Where the head of a division of the Bureau of Internal Revenue having charge and consideration of the plaintiff's tax returns had a general

authorization from the Commissioner of Internal Revenue to sign the Commissioner's name to waivers extending the statutory time for assessment and collection of income and profits taxes, waivers signed by the plaintiff and having the Commissioner's name signed either by such head of division or by one of his clerks under his direction, were valid waivers.

Validity of waiver; constructive consent in writing.—The Commissioner of Internal Revenue notified the plaintiff in writing of proposed deficiencies in its income and profits taxes for prior years and requested it to execute and return proper waivers, inclosed with the notice, for extending the time for assessment and collection, which was done by plaintiff, both knowing that but for such waivers assessment and collection would be barred. *Held*, that the Commissioner's written request for the waivers, the plaintiff's execution and filing of them in response to such request, and the assessment and collection of the deficiencies by the Commissioner after his authority to do so had expired but for the waivers, met the requirements of the statute that both the Commissioner and the taxpayer should consent in writing to assessment and collection after the statutory period therefor had expired.

Commissioner's notice of proposed deficiency; taxpayer's waiver of appeal, and consent to assessment; failure of Commissioner to send 60-day letter.—Where the Commissioner of Internal Revenue advised the plaintiff on July 24, 1925, of a proposed deficiency in its income and profits taxes for the year 1916, and plaintiff on August 10, 1925, waived the right of appeal to the Board of Tax Appeals and consented to immediate assessment of the deficiency, the assessment and collection were not invalid by reason of the Commissioner's failure to send plaintiff the 60-day deficiency notice contemplated by sections 274 (a) and 280 of the Revenue Act of 1924.

Same.—A deficiency assessment and collection of income and profits taxes against the plaintiff for the year 1917 made prior to the enactment of the Revenue Act of 1924, and an adjustment and reduction of which was based upon an agreement of the parties entered into at the request of the plaintiff, were not invalid because of the Commissioner's failure to send plaintiff a 60-day deficiency letter, such failure being at most an irregularity which did not invalidate the assessment or collection of the tax.

The Reporter's statement of the case:

Mr. Fred A. Woodis for the plaintiff. *Mr. Francis R. Lash* of counsel.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is a Delaware corporation with its principal office and place of business at Nazareth, Pa. It is the successor of the Clinchfield Portland Cement Corporation, a Virginia corporation, which was merged with the plaintiff September 23, 1926. Upon merger of the two corporations plaintiff took over all the assets and assumed all the liabilities of the Virginia corporation, and at that time the Virginia corporation surrendered its corporate charter and ceased to exist as a corporation. For convenience the name "plaintiff" will be used indiscriminately as applying to both corporations.

2. Income and/or profits tax returns were filed and the tax shown due thereon was paid as follows:

Year	Date return was filed	Tax shown due	Date of payment
1914	Feb. 26, 1915	$1,489.78	June 28, 1915
1915	Mar. 29, 1916	1,813.54	June 29, 1916
1916	Mar. 26, 1917	2,701.78	June 8, 1917
1917	Mar. 29, 1918	28,835.49	June 15, 1918

3. After an audit of plaintiff's returns for 1913, 1914, 1915, 1916, and 1917, the Commissioner of Internal Revenue advised plaintiff January 29, 1923, as to the results of such audit as follows:

Year	Overassessment	Deficiency
1913	$212.22	
1914	235.97	
1915	370.34	
1916	482.93	
1917		$108,177.50

The foregoing letter advised plaintiff of its right to protest such determination within thirty days, and also that, in the event it desired to protest, a waiver of the statute of limitations should be filed. February 23, 1923, plaintiff filed an unlimited waiver with the Commissioner for 1917. The name "D. H. Blair, Commissioner", with the initials "AHF" thereunder, was not placed thereon by the said D. H. Blair, but it was placed thereon after its receipt in the Bureau of Internal Revenue from plaintiff. After protest by plaintiff

on or about June 28, 1923, the deficiency of $108,177.50 for 1917 was assessed July 6, 1923.

4. At a conference July 18, 1923, between representatives of plaintiff and the Commissioner, certain adjustments were tentatively agreed to which would result in a reduction of the deficiency for 1917 from $108,177.50 to approximately $28,000, and July 27, 1923, plaintiff advised the Commissioner as follows:

> With respect to the conference with the Bureau of Internal Revenue held on July 18th, 1923, in connection with our appeal from the findings for 1917 and prior years set forth in your registered letter dated January 30th, 1923, we accept the manner of disposition of the items as tentatively agreed in said conference, of which a memorandum is attached hereto.
>
> No mention, however, is made in the memorandum regarding the treatment of the earned surplus of Kingsport Power Corporation. This item is referred to on page 12 in your letter mentioned above, but at the conference we were advised it would be handled as a liquidating dividend instead of added to the amount credited on account of the sale of the power plant.
>
> We also enclose a statement by years of additions to the cement plant made by our company, for convenience in the recomputation of the income and excess profits taxes for the year 1917.
>
> Yesterday we were greatly surprised to receive from the collector at Nashville the notice and demand for payment before August 5th, 1923, of the additional income- and excess-profits taxes for the year 1917, without any consideration given to our appeal, which undoubtedy is due to a mistake somewhere, and it is respectfully requested that the demand for payment of this additional tax be held up until a final recomputation is made in accordance with the data submitted herewith.

July 30, 1923, the Commissioner instructed the collector to withhold demand for the payment of the additional assessment for 1917 which had been made as shown in finding 3.

5. July 26, 1923, plaintiff received from the collector certificates of overassessment for 1913, 1914, 1915, and 1916 which showed overassessments for those years in the respective sums of $178.51, $235.97, $370.34, and $482.93. The foregoing overassessments were found to be overpayments, and the total amount, $1,267.75, was credited August 14,

1923, to the outstanding and unpaid additional tax for 1917, thus reducing such additional tax from $108,177.50 to $106,909.75.

6. August 23, 1923, plaintiff forwarded to the Commissioner additional information with respect to its tax liability for 1917, and on the basis of further requests from the Commissioner additional information was promptly furnished to the Commissioner with respect to 1917 on August 28, 1923, October 2, 1923, October 15, 1923, and November 7, 1923.

7. December 14, 1923, plaintiff filed an unlimited waiver of assessment and collection for 1917 and 1918. The foregoing waiver was not signed by the Commissioner, but his name was placed thereon by S. Alexander December 19, 1923, under a general authorization previously issued to him by the Commissioner.

8. After a further conference and after certain additional information had been furnished by plaintiff January 14, 1924, at the request of the Commissioner, plaintiff, on January 6, 1925, filed another waiver of the period within which assessment might be made for 1917, such waiver to remain in effect until December 31, 1925. The waiver was received in the office of one L. T. Lohman, who was then head of the division in which the return was being considered. Lohman at the time had a general authorization from the Commissioner to sign the Commissioner's name to waivers. At Lohman's direction the comissioner's name was signed to this waiver by an employee in his office acting under him.

9. April 30, 1925, plaintiff called attention to the delay in the determination of its tax liability for 1917 and urged that the matter be expedited. July 24, 1925, the Commissioner advised plaintiff of a further tentative determination of its tax liability for the years 1913 to 1917, inclusive, and gave plaintiff thirty days within which to file a protest against that determination. Overassessments and deficiencies were shown in such determination as follows:

Year	Overassessment	Deficiency
1913	$63.91	
1914		$7.22
1915		82.98
1916		381.92
1917	78,788.55	

Included in the letter of July 24, 1925, was the following statement:

> In accordance with Article 841, Regulations 62, you are required to sign and return the inclosed waiver consenting to the assessment of additional taxes for the years 1914–1916, inc., as a prerequisite to the allowance of the additional income shown for those years in the computation of your invested capital for 1917 and subsequent years.

10. August 10, 1925, plaintiff executed and filed with the Commissioner a waiver of the period within which assessment might be made for 1914, 1915, and 1916, such waiver to remain in effect until December 31, 1925. This waiver was received in the office of a Mr. H. B. Robinson, head of the division in which the returns for the years 1914, 1915, and 1916, were being considered. Robinson at the time had a general authorization from the Commissioner to sign the Commissioner's name to waivers. At the direction of Robinson the Commissioner's name was signed to this waiver by an employee of his office acting under him.

On the same day, namely, August 10, 1925, plaintiff filed an agreement waiving the right of appeal under section 274 (a) of the Revenue Act of 1924 and consenting to immediate assessment of the deficiencies for 1914, 1915, and 1916 as shown in the Commissioner's letter of July 24, 1925. The foregoing deficiencies were assessed October 27, 1925.

11. November 9, 1925, plaintiff received certificates of overassessment for 1913 and 1917 showing overassessments for those years in the respective amounts of $63.91 and $78,788.55. The overassessment for 1913 was found to be an overpayment and was credited to the outstanding and unpaid additional tax for 1917. The overassessment for 1917 being an amount theretofore assessed and then outstanding and unpaid was abated, and that abatement, together with the credits theretofore made, reduced the unpaid additional assessment for 1917 to $28,057.29.

12. Accompanying the certificates of overassessment referred to in finding 11 were notices and demands for payment of the additional taxes for 1914, 1915, and 1916 referred to in finding 9, and an outstanding and unpaid balance of additional tax for 1917 of $28,057.29, together with interest

thereon of $3,847.50. The notices required payment to be made within ten days under threat of the imposition of a penalty of 5 percent of such amounts and the further penalty of an increased rate of interest thereon for failure of prompt payment. Thereafter plaintiff, in order to avoid the consequences of the 5-percent penalty and increased rate of interest, paid the various amounts referred to above under protest November 16, 1925.

13. The Commissioner has not at any time mailed to plaintiff a notice, within the purview of section 274 (a) and section 280 of the Revenue Act of 1924, of his determination of a deficiency in tax for any one or more of the taxable years 1914, 1915, 1916, and 1917 from which plaintiff could have appealed to the United States Board of Tax Appeals for a determination of its tax liability for such year or years.

14. October 24, 1929, plaintiff filed the following letter with the Commissioner:

> Reference is made to certificate of overassessment no. 862381 which was issued to the above-named corporation on or about November 6, 1925. The certificate referred to indicated an overassessment of income taxes for the year 1913, in the amount of $63.91. It appears from such certificate that this overassessment was allowed by the Commissioner on schedule no. 17228.
>
> The total amount of this overassessment, $63.91, was credited to additional taxes alleged to be due for the year 1917. Since the collection of the additional tax for 1917 was barred, by the applicable statute of limitations, at the time the credit was made, such credit was erroneous. Therefore, request is hereby made that the sum of such overpayment, $63.91, together with interest thereon be now refunded.
>
> If, for any reason, it is contemplated to disallow the claim herein made, it is respectfully requested that a conference be arranged with the office handling the matter and notice of such conference be sent to the undersigned.

No reply thereto was made by the Commissioner.

15. November 5, 1929, plaintiff filed claims for refund of the additional tax and interest thereon paid for 1914, 1915, 1916, and 1917, as set out in finding 12, and assigned the following basis therefor:

Opinion of the Court

The above tax was assessed and/or collected when the Commissioner, and/or the collector, was without a legal right so to do. Such tax was assessed and/or collected after the expiration of the statutory period properly applicable thereto, at a time when such assessment and/or collection were barred by the applicable statute of limitations. Such assessment and/or collection were erroneous and illegal.

The foregoing claims were rejected by the Commissioner April 25, 1930, and such amounts have not been paid to the plaintiff.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff, the Pennsylvania-Dixie Cement Corporation, successor of the Clinchfield Portland Cement Corporation of Virginia, with which it was merged on September 23, 1926, brings suit to recover additional income taxes assessed against and paid by its predecessor for the years 1914 to 1917, inclusive, amounting to $32,376.91. For convenience the name "plaintiff" is used in the findings as applying to both corporations and will be so used in the opinion.

The plaintiff duly filed its tax returns for the years involved and paid the taxes shown to be due thereon. After various transactions set forth in detail in the findings, not necessary to repeat here, the Commissioner of Internal Revenue, on July 24, 1925, advised plaintiff of a recomputation of its taxes for the years involved. This recomputation showed an overassessment of $63.91 for 1913, an overassessment of $78,788.55 for the year 1917, and small deficiencies for the years 1914 to 1916, inclusive. The Commissioner requested plaintiff to file waivers for the years 1914 to 1916, as a prerequisite to the allowance of additional invested capital for 1917 and subsequent years.

On August 10, 1925, plaintiff executed and filed the waivers requested for the years 1914, 1915, and 1916, effective to December 31, 1925, and on the same date filed an agreement waiving the right to appeal to the Board of Tax Appeals and consenting to the immediate assessment of the

deficiencies for those years. The deficiencies were assessed by the Commissioner on October 27, 1925.

The Commissioner had previously, on June 28, 1923, made an additional assessment for the year 1917 of $108,177.50, which amount had not been paid.

On November 9, 1925, the plaintiff received certificates of overassessments for the years 1913 and 1917 in the amounts of $63.91 and $78,788.55, respectively. The overassessment for 1913 which was found to be an overpayment was credited against the taxes due for 1917, and since the balance of the unpaid assessment for 1917 exceeded the overpayment for that year such balance was abated, reducing the unpaid taxes for the year $28,057.29. Accompanying the certificates of overassessment were notices and demands for the payment of the additional assessment for 1914 to 1916, inclusive, and the unpaid taxes due for 1917 with interest. These amounts, aggregating $32,376.91, were paid by the plaintiff, under protest, on November 16, 1925.

The plaintiff contends that the additional taxes for the years 1914, 1915, 1916, and 1917 were assessed and collected after the expiration of the applicable statutory period of limitation.

The plaintiff's returns for the years 1914, 1915, 1916, and 1917 were filed on February 26, 1915, March 29, 1916, March 26, 1917, and March 29, 1918, respectively. The applicable statutory period of five years within which assessments and collections could be made expired on February 26, 1920, March 29, 1921, March 26, 1922, and March 29, 1923, respectively. The additional taxes for each of the years involved were assessed and collected subsequent to the running of the applicable statutory period of limitation and were therefore erroneously and illegally assessed and collected unless valid waivers were on file extending such statutory period.

At the request of the Commissioner, the plaintiff, on August 10, 1925, as we have seen, executed and filed with the Commissioner a waiver of the period within which assessment might be made for the years 1914, 1915, and 1916 to December 31, 1925. This waiver, duly signed by the plaintiff, was received in the Bureau of Internal Revenue.

Mr. H. B. Robinson, the head of the division in which plaintiff's returns were being considered, had a general authorization from the Commissioner to sign the Commissioner's name to waivers. At the direction of Mr. Robinson, an employee working under him signed the Commissioner's name to the waiver, appending Mr. Robinson's initials thereto.

In respect to the year 1917, the Commissioner of Internal Revenue, in his letter notifying plaintiff of the proposed deficiency for that year, advised that a waiver of the statute of limitations would be necessary in case protest was made by plaintiff against the proposed assessment. On February 23, 1923, plaintiff executed and filed in the Bureau of Internal Revenue a waiver for 1917 which by its terms expired on February 23, 1924. The name "D. H. Blair, Commissioner" with the initials "A. H. F." thereunder appears on the waiver. The additional taxes involved for the year 1917 were assessed on July 6, 1923, well within the life time of the waiver.

Subsequently, on January 6, 1925, plaintiff, at the request of the Commissioner, filed another waiver for the period in which assessment might be made for 1917 to December 31, 1925. The head of the division in the Bureau in which plaintiff's 1917 return was being considered was a Mr. L. T. Lohman, who had a general authorization from the Commissioner to sign his name to income tax waivers. At Mr. Lohman's direction the Commissioner's name was signed to this waiver by a clerk in his office who appended Mr. Lohman's initials thereto.

If the foregoing waivers were valid, all the taxes involved were timely assessed. But the plaintiff says they were not valid for the reason that they were not signed by the Commissioner himself or by some one duly authorized to act for him in that respect. It is contended that the waivers did not meet the statutory requirement of a consent in writing by "both the Commissioner and the taxpayer" but were consents of the taxpayer only, the Commissioner not having indicated his consent to them in the manner required.

We think the plaintiff's contentions are entirely without merit. The head of the division in the Bureau which con-

sidered the returns for 1914 to 1916 inclusive, had a general authorization to sign the Commissioner's name to waivers. We think it immaterial whether this official personally placed the Commissioner's name on the waivers for those years or had it placed thereon by one of the clerks of his office working under his directions. It could make no earthly difference to the plaintiff or to any one else whether this official personally signed the Commissioner's name to the waiver or whether that act was performed at his direction by a clerk in his office. In substance the act of the clerk was the act of the official himself. The waiver for the years 1914 to 1916 was therefore valid. The same is true as to the waivers for the year 1917 signed on behalf of the Commissioner under the same circumstances.

Furthermore, and entirely aside from the fact that the Commissioner's name was authoritatively placed on the waivers in the manner stated, we think under the facts disclosed that both the Commissioner and the taxpayer in this case consented in writing to a later determination, assessment, and collection of all the taxes involved. The Commissioner of Internal Revenue on reaching a determination of the deficiencies in question notified the plaintiff of that fact in writing, and also requested plaintiff to execute and return proper waivers which were enclosed. Both the plaintiff and the Commissioner knew that, if postponement of the additional assessments was made, the statute of limitations would run and the taxes could not legally be assessed and collected in the absence of waivers. Knowing this, the plaintiff promptly executed the waivers and returned them to the Commissioner as requested. With such waivers duly signed by the plaintiff on file, the Commissioner, within the time as extended, proceeded to make the assessments and thereafter made timely collection of the taxes. The action of the Commisisoner in requesting the waivers in writing, the execution of the waivers by plaintiff and the filing of them with the Commissioner in response to the request, and the subsequent assessment of the taxes by the Commissioner after his authority to do so had expired but for the waivers, clearly meet the requirements of the statute that "both the Commissioner and the taxpayer" have "consented in writing"

to the assessment of the taxes after the limitation prescribed in the statutes. In these circumstances it was entirely immaterial whether the Commissioner's name was ever attached to the waivers either by himself or by someone authorized to act for him in that regard.

Plaintiff makes the further contention that the assessment and collection for the years 1916 and 1917 were erroneous and illegal because the Commissioner did not send the taxpayer the deficiency notice required in Sections 274 (a) and 280 of the Revenue Act of 1924. In respect to this contention it is sufficient to point out that for the year 1916 the Commissioner advised plaintiff of the proposed deficiency on July 24, 1925, and that on August 10, 1925, the plaintiff waived the right of appeal to the Board of Tax Appeals and consented to the immediate assessment of the deficiencies, and that the assessment for 1917 was made prior to the passage of the 1924 Revenue Act and that the adjustment and reduction of the assessment involved for that year was based on an agreement of the parties entered into at the request of plaintiff. In these circumstances the failure of the Commissioner to send a 60-day letter was at most an irregularity which did not invalidate the assessment or the collection of the tax for either year.

The plaintiff is not entitled to recover, and it is ordered that the petition be dismissed.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

BERNARD GREENBAUM v. THE UNITED STATES

[No. M-178. Decided December 7, 1936]

On the Proofs

Income tax; deductible loss; res adjudicata.—Where losses by the plaintiff resulting from his indorsement and payment in 1922 and 1923 of notes of an insolvent corporation in which he was a stockholder were held by the Board of Tax Appeals to be deductible from gross income in determining his taxable net income for such years, the question in a subsequent suit for

Reporter's Statement of the Case

refund, in the Court of Claims, of whether similar losses in 1924 and 1925 were deductible in the determination of his taxable net income for those years was *res adjudicata* under said decision of the Board of Tax Appeals.

Statute of limitations; claim for refund.—In a suit for refund of overpayment of income tax for 1924 paid in quarterly installments, there can be no recovery of an installment for which refund claim was not filed within the limited statutory period therefor.

The Reporter's statement of the case:

Mr. George E. H. Goodner for the plaintiff.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. During the years 1922 to 1925, inclusive, the plaintiff was a resident of New York City, New York, and a stockholder and the treasurer of Grayona Needlecraft Corporation. This was a New York corporation engaged in the business of manufacturing and selling needlecraft material and prior to 1923 was known as Lorimer Greenbaum Company, Incorporated. The plaintiff spent the most of his time on the road selling the products of the said corporation to the retail trade. His trips averaged about six weeks each.

2. Plaintiff timely filed his personal Federal income tax return for the calendar year 1924, reporting thereon a total income from salaries and commissions of $67,500.00, less entertainment expenses of $5,500.00; other income from dividends of $144.00; a total gross income of $62,144.00; deductions therefrom of $10,654.52 for interest paid, $332.44 as taxes paid to the State of New York, and $2,800.00 as contributions to charitable organizations, all amounting to $13,786.96, leaving a net taxable income of $48,357.04 and a total tax due thereon of $5,668.48. The Commissioner of Internal Revenue made no changes in the return and this sum was paid by plaintiff in four equal installments of $1,417.12 on the 15th day of March, June, September, and December 1925.

3. Plaintiff also timely filed his income tax return for the calendar year 1925, reporting thereon a total income from

salaries and commissions received from the Grayona Needlecraft Corporation of $60,000.00, less entertainment expenses of $5,500.00; other income from dividends of $144.00; a total gross income of $54,644.00; deductions therefrom of $13,654.96 for interest paid, $613.34 as taxes paid to the State of New York, and $2,500.00 as charitable contributions, all amounting to $16,768.30, leaving a net taxable income of $37,875.70 and a total tax due thereon of $2,842.93. The Commissioner of Internal Revenue subsequently audited this return, disallowed the claimed item of entertainment expenses of $5,500.00, and thereby increased plaintiff's net taxable income to $43,375.70, resulting in a total tax due thereon of $3,701.67. This sum was paid by plaintiff as follows:

March 19, 1926	$710. 73
June 16, 1926	710. 78
Sept. 16, 1926	710. 70
May 7, 1931	710. 70
May 29, 1931	858. 76
Total	3, 701. 67

4. Plaintiff kept no books during the years 1924 and 1925 but his Federal tax returns were prepared upon the basis of cash receipts and disbursements.

5. The plaintiff did not receive a regular or fixed salary from the Grayona Needlecraft Corporation during 1924 and 1925 but did receive commissions on sales, together with a bonus at the end of each year, and that was based upon the volume of sales during the year. The corporation carried upon its books a drawing or salary account for the plaintiff, to which it charged all withdrawals that he made and all payments made by the corporation on his behalf and to which it credited commissions and bonuses earned by him, amounts which he personally repaid to the corporation, and amounts paid to the corporation for him by others. The total amount entered in plaintiff's salary account as payments made by the corporation to or for him during 1924 was $129,223.84, not including amounts advanced to him as travel expenses aggregating $6,951.83. This sum of $129,223.84 included $39,800.00 paid to the plaintiff, $54,354.05

paid for him by the corporation upon notes of the Lyk-Glas Corporation, and $35,069.79 representing other miscellaneous payments made for plaintiff by the corporation for items including insurance, taxes, and interest.

During 1924 the Lyk-Glas Corporation repaid to the Grayona Needlecraft Corporation $4,000.00 of the $54,354.05 received as aforesaid. The plaintiff himself repaid to the corporation sums aggregating $35,530.40, and the corporation received from others (in addition to the $4,000.00 paid by the Lyk-Glas Corporation) sums aggregating $20,752.00. Separate items making up these totals of $4,000.00, $35,530.40, and $20,752.00, in the sum of $60,282.40, were credited by the corporation to plaintiff's salary account.

6. Late in 1922 plaintiff's brother, Victor Greenbaum, and one Walter G. Ross organized a corporation known as "Lyk-Glas Corporation" with a total issued stock of $28,500.00, of which the plaintiff purchased $5,000.00. Plaintiff was a director of the corporation for the first three or four months of its existence, but was neither director nor officer thereafter. This corporation engaged in the business of repainting automobiles by means of a patented quick-drying process. Its business expanded rapidly and early in 1923 it was in need of additional operating capital. Its stockholders, including plaintiff, thought the prospects were good for handsome profits and decided to borrow the necessary capital rather than to raise it by selling more stock. However, it could not borrow on its own notes without acceptable endorsers and the plaintiff agreed to use his credit and to endorse notes for whatever capital might be needed, believing that he would never be called upon to pay the notes.

7. Plaintiff's first endorsement of notes of the Lyk-Glas Corporation was in February 1923, when he endorsed a series of notes in the aggregate amount of $20,000.00 in order to assist the corporation in establishing a line of credit at the Columbia Bank. The entire amount was borrowed within the next month. These were all short-term notes and were paid by plaintiff when due. In June and July 1923, further expansion of the business necessitated the endorsement of additional notes in order to obtain further working capital. These loans were obtained from "loan sharks" at

a high rate of interest and discount. Each time that a note fell due and the corporation could not pay, plaintiff paid it or endorsed a new note to take it up.

8. The business of the Lyk-Glas Corporation appeared to prosper until about July 1923, when the plaintiff decided that it was actually a losing venture, partly because of the high-operating expenses and the fact that guaranteed paint jobs were proving unsatisfactory and cars were being returned for repainting under the terms of the corporation's warranty, and more particularly by reason of the competition arising from the introduction and use by competitors of the "Duco" painting process.

9. Before the end of 1923 all hope of success of the Lyk-Glas Corporation was gone, but plaintiff insisted that the business be continued even at a loss. This was because of his endorsements on the corporation's notes which he now knew he would have to pay. If compelled to pay them all at once, the burden would have crushed him, but by spreading the payments over a period of time, he thought he could take care of them out of his earnings. Furthermore, plaintiff knew that if the Lyk-Glas Corporation notes were permitted to go to protest with his endorsement on them, it would ruin his credit. Upon plaintiff's insistence, therefore, the Lyk-Glas Corporation continued in business at a loss until about the end of 1925. During this time plaintiff was able to liquidate its indebtedness represented by the notes on which he was endorser.

10. During 1924 the Lyk-Glas Corporation, while operating its business at a loss, experimented with other paint processes in an attempt to meet its competition. It continued a losing venture until early in 1926 when the process rights and shop equipment were sold to a former employee in consideration of his agreement to assume outstanding obligations of the corporation approximating $1,200.00, together with his personal note for $2,000.00, which was never paid.

11. All of the notes endorsed by the plaintiff as stated above, which matured in 1924, in the aggregate sum of $54,354.05, were paid for him by Grayona Needlecraft Corporation and charged to his drawing or salary account. During

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1925 one such payment was similarly made by the Grayona Needlecraft Corporation in the sum of $1,500.00 and charged to plaintiff's salary account. Plaintiff made payment by his personal checks during 1925 upon such notes so endorsed as follows:

March 12 to Nat Ottensoser		$500.00
November 16 to Eugene Loeb		900.00
November 18 to	S. Friedman	1,200.00
	Eugene Loeb	3,000.00
Total		5,600.00

12. Plaintiff has never been reimbursed for any of the aforesaid payments made by him on endorsements of Lyk-Glas Corporation notes, except as herein stated. The said payments were set up on the books of the Lyk-Glas Corporation as accounts payable to plaintiff. Said notes were also endorsed by Victor Greenbaum and Walter C. Ross, but these two endorsers were insolvent and unable to pay and plaintiff has never recovered anything from them. Before endorsing the corporation's notes, plaintiff had an agreement that, before any dividends were paid, he should be repaid in full for any payments he might make.

13. At the time the Commissioner of Internal Revenue assessed the additional tax of $858.76 for 1925, which was paid on May 29, 1931, as set out in Finding 3 above, he also assessed interest thereon in the amount of $74.69 which amount was paid by plaintiff on May 29, 1931. No part of the taxes and interest paid by plaintiff for 1924 and 1925, as aforesaid, has been refunded.

14. In determining the income upon which the aforesaid taxes for 1924 and 1925 were assessed, the Commissioner of Internal Revenue allowed no deductions in respect of the payments made by plaintiff on notes of the Lyk-Glas Corporation.

15. On April 17, 1929, the plaintiff filed separate claims for refund of all taxes paid for the years 1924 and 1925, both stating as grounds that he "failed to deduct losses sustained by him during the year on account of payments made by him of notes which he endorsed for others in the course

of his business dealings." These claims were disallowed by the Commissioner of Internal Revenue on a schedule dated June 11, 1929.

16. Plaintiff is the same party as the petitioner in the case of Ben Greenbaum, reported at 20 B. T. A. 469, and that decision became final without any appeal therefrom by the Commissioner.

The court decided that plaintiff was entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

This is a suit to recover overpayments of income taxes by plaintiff upon his personal returns for the calendar years 1924 and 1925.

The sole issue for decision is whether certain payments made by plaintiff during these years are statutory losses properly deductible in determining his taxable net income for those years. The Commissioner of Internal Revenue declined to allow the deduction.

The plaintiff endorsed certain notes of the Lyk Glass Corporation in 1922 and 1923. The corporation became financially involved in those years and plaintiff was called upon in 1922, 1923, 1924, and 1925 to pay the notes or renewals thereof. The corporation was hopelessly insolvent and there can be no question that plaintiff sustained a loss of the entire amount which he was required to pay. The plaintiff filed a petition before the Board of Tax Appeals on the identical facts and involving the same statute and claiming losses for the years 1922 and 1923 on notes paid during these years. By a decision of the Board in August 1930, 20 B. T. A. 469, the plaintiff was held entitled to deduct losses sustained by reason of the notes which he had paid in those years. The present suit is for the years 1924 and 1925, claiming the right to deduct the losses occasioned by the further payment on the same notes during those years on which he was endorser.

The decision of the Board of Tax Appeals is *res judicata.* It was a decision on the merits between the same parties and upon the same demand for previous years. The tax-

payer is entitled to "relief from redundant litigation of the identical question of the statute's application to the taxpayer's status." *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620. The first installment of the 1924 tax is barred, no refund claim having been filed within the statutory period.

Judgment will accordingly be entered in favor of plaintiff by giving effect to those deductions, with entry of judgment suspended pending the submission of a computation by the parties on that basis. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

TRIEST & EARLE, A CORPORATION, v. THE UNITED STATES

[No. 42051. Decided December 7, 1936]

On the Proofs

Contract for navigation channel fenders for Arlington Memorial Bridge; breach of contract; extra compensation.—Where the specifications of the Government contract for construction of fenders for the navigation channel through the draw span of the Arlington Memorial Bridge provided that bidders for the work should examine and inform themselves as to the situation, conditions and difficulties of the work, including conditions due to work performed by other contractors, and that no allowance would be made by the Government for failure correctly to estimate the difficulties attending the performance of the contract, and there was no misrepresentation or misleading action on the part of the Government, the contractor is not entitled to extra compensation for work resulting from subsurface obstructions of which it did not have knowledge but of which it could have informed itself by reasonable prior investigation of the site of the work.

The Reporter's statement of the case:

Mathews & Trimble for the plaintiff. *Mr. J. C. Trimble* was on the brief.

Messrs. M. Leo Looney, Jr. and *Henry A. Julicher*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is a corporation of the State of Pennsylvania, with home office at Philadelphia.

2. On July 2, 1930, the Arlington Memorial Bridge Commission advertised for bids "for furnishing all labor, plant and equipment, and materials, and constructing therewith the fenders in the navigation channel through the Bascule Draw Span opening of the Arlington Memorial Bridge, Washington, D. C."

Plaintiff received a copy of the plans and specifications of the projected work for bidding purposes. Among the general provisions of the specifications were the following:

> 10. BIDDERS TO VISIT SITE.—Bidders are expected to visit the site of the work and to inform themselves as to all existing conditions. They are expected to examine the work already in place and to familiarize themselves as to the progress and schedules of all work which may be under way and which might in any way affect the progress of their work. * * * Failure to do so will in no way relieve the successful bidder from the necessity of furnishing all equipment and materials, and performing all work required for the completion of the contract in conformity with the specifications.
>
> No allowance will be made for the failure of a bidder correctly to estimate the difficulties attending the execution of the work.

After setting out an estimate of the quantities of finished work to be done the specifications, article 34, provided:

> The above quantities have been computed with ordinary care and accuracy from the contract drawings, and are believed to be substantially correct, but they are furnished only for the information and convenience of bidders and without responsibility to the United States. Bidders are expected to compute or otherwise to verify from the contract drawings the actual amounts of materials to be furnished, and the work to be done, and no claims for adjustment arising from any errors, either relative or absolute, which may be discovered in any of the above quantities will be allowed.

Article 35, after identifying the drawings which were to form a part and supplement of the specifications provided:

> The above drawings and these specifications are intended to be mutually explanatory and complete. In case of any disagreement between the drawings and specifications the latter shall govern.

Articles 41 and 42 of the specifications were as follows:

> 41. COMMENCEMENT AND PROSECUTION.—The contractor shall commence the work covered by this contract within thirty (30) days after the date of receipt of notification of the signing of the contract by the Contracting Officer, and he shall prosecute the work with faithfulness and energy so as to finish the entire work within the time fixed in paragraph 42 below.
>
> Attention of all bidders is invited to the fact that the erection of the bascule draw span has not yet been completed to the extent that the channel through the span can be turned over for the fender construction work; and the Phoenix Bridge Company, the general contractor doing the erection of the draw span, has advised the contracting officer that the erection will not be completed to that extent until about September 1, 1930. Accordingly, actual operations under the provisions of the present contract cannot be undertaken immediately underneath the bridge until that date, or such later date when the erection work shall have been completed. However, the work of driving the piles for the pile clusters and practically all work of the timber wing structures can be started immediately. Also, the work of casting the concrete piles and of purchasing the timber and timber piles can be started immediately after the award of the contract.
>
> 42. TIME FOR COMPLETION AND LIQUIDATED DAMAGES.—The entire work of this contract shall be completed on or before December 15, 1930; and the time for completion, as just stated, will be made a part of the contract, which will also provide for liquidated damages in the amount of fifty dollars ($50.00) per calendar day for all delay in completing the work beyond the date fixed above: *Provided, however*, That the date so fixed for completion shall be automatically postponed by the same number of days which the contractor is actually delayed by reason of the noncompletion of the erection of the bascule draw span after September 1, 1930.

> In the event the erection of the draw span is not completed by September 1, 1930, the contracting officer will not be responsible for any delays, beyond the extension of the time for completion as provided for above, which may be occasioned by the contractor by reason of weather conditions or conditions of the river, either before or after the date set for the completion of the work.

3. After receipt of the plans and specifications and before bidding on the work, plaintiff caused its representative to visit the site of the work for the purpose of an examination thereof. At that time there was a temporary fender system that had been installed by the Phoenix Bridge Company at the approximate location of the work to be done. Plaintiff's representative consulted with the superintendent of the Phoenix Bridge Company, then on the work, and asked him if he had observed any difficulty in driving the piles. He said that he had not and that he had not encountered any obstructions in the river at the time that he was driving the piles.

4. Thereafter plaintiff submitted a bid on the work to be done, the bid was accepted, and on September 25, 1930, a contract in writing was entered into between plaintiff and defendant, by U. S. Grant, 3d, as contracting officer, Arlington Memorial Bridge Commission, whereby plaintiff agreed to furnish the materials and do the work called for, at a total consideration of $49,711.96.

The specifications and drawings hereinabove referred to were by the contract agreed to be a part thereof.

Article 4 of the contract provided:

> *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his

representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this contract.

The contract and specifications thereof are filed in the case as plaintiff's Exhibit No. 2 and made part hereof by reference.

5. The contract nowhere disclosed the presence of any obstructions that might be encountered by plaintiff in the setting and driving of the required piles. The contract drawings did indicate the location of the mud line and the underlying surface of bed rock on which the piles were to rest.

6. Plaintiff proceeded with the work and in the course thereof encountered, while driving piles close to the abutments, obstacles in the form of heavy timbers that had been used by a preceding contractor in the construction of the abutments to build the necessary falsework or cofferdams, and left there in the mud. Plaintiff, in the presence and with the knowledge of defendant's inspectors, endeavored to overcome the difficulty, in some instances by driving the piles, which were of concrete construction, through the embedded timbers, in other instances removing timbers through the services of a diver. In still other instances the direction of the pile was so deflected by the timbers that it was driven out of the position specified by the contract. These difficulties required the expenditure of additional time and money by the plaintiff.

7. On November 15, 1930, plaintiff, in a letter to the contracting officer, set forth the difficulties thus encountered, protested against performing the work "without proper compensation", and asked for a written decision.

On December 5, 1930, plaintiff wrote to the Arlington Memorial Bridge Commission requesting a written order covering "changed conditions."

On December 9, 1930, the Arlington Memorial Bridge Commission by letter to plaintiff, refused plaintiff additional compensation for the additional work complained of,

on the ground that under Article 10 of the specifications the bidder was obligated to visit the site "and to estimate all difficulties attending the work."

Further correspondence on the matter ensued between the parties and it was finally referred to the Comptroller General of the United States, who on June 1, 1931, rendered a decision holding that plaintiff had no claim against the United States on account of the difficulties encountered.

8. On March 20, 1931, the Arlington Memorial Bridge Commission granted plaintiff an extension of time for completion to April 16, 1931, due to the fact that the draw span could not be turned over completely to plaintiff until January 1, 1931, and on the same day, to wit, March 20, 1931, accepted plaintiff's work as satisfactory in all respects.

9. The cost to plaintiff additional to that which would have been incurred had the obstacles hereinabove described not been encountered, was $4,259.01, and plaintiff has not been reimbursed the whole or any part thereof. It is not in excess of the reasonable cost.

The court decided that plaintiff was not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

The plaintiff brings this suit to recover damages for a breach of contract growing out of an alleged misrepresentation.

On July 2, 1930, the Arlington Memorial Bridge Commission advertised for bids "for furnishing all labor, plant and equipment, and materials, and constructing therewith the fenders in the navigation channel through the Bascule Draw Span opening of the Arlington Memorial Bridge, Washington, D. C." The plaintiff received a copy of the plans and specifications of the projected work for bidding purposes. Among the general provisions of the specifications were the following:

> 10. BIDDERS TO VISIT SITE.—Bidders are expected to visit the site of the work and to inform themselves as to all existing conditions. They are expected to exam-

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> ine the work already in place and to familiarize themselves as to the progress and schedules of all work which may be under way and which might in any way affect the progress of their work. * * * Failure to do so will in no way relieve the successful bidder from the necessity of furnishing all equipment and materials, and performing all work required for the completion of the contract in conformity with the specifications.
>
> No allowance will be made for the failure of a bidder correctly to estimate the difficulties attending the execution of the work.

In the specifications the plaintiff's attention was drawn to the fact that the Phoenix Bridge Company was then erecting the Bascule Draw Span and the actual operations of the plaintiff's contract would have to await the completion of the contract of the Phoenix Bridge Company. Plaintiff had knowledge, or could have acquired knowledge, that the work of the Phoenix Bridge Company required the driving of piles and it was also aware at that time that the work of the other contractor had not been completed. On September 25, 1930, the plaintiff entered into a contract with the defendant whereby it agreed to furnish the materials and do the work as called for in the plans and specifications for the sum of $49,711.96.

The contract did not disclose the presence of any obstructions, the contract drawings indicating only the mud-line and the underlying surface of bedrock on which the piles were to repose. It does not appear that the drawings were for the purpose of showing obstructions, if any existed. That such was their purpose is negatived by the notice to the bidder that he was expected to visit the site, and that no allowance would "be made for the failure of a bidder correctly to estimate the difficulties attending the execution of the work." After the plaintiff commenced the driving of the piles, it encountered obstacles close to the abutments in the form of heavy timbers that had been used by the former contractor to build the necessary falsework or cofferdams, and left there in the mud. It was necessary for the plaintiff to remove these obstructions or to drive the concrete piles through the embedded timbers. The extra work necessarily

entailed in overcoming these obstructions imposed upon the plaintiff an additional cost of $4,259.01.

The plaintiff contends that the Government, by the omission in contract or contract drawings to disclose the presence of the obstructions afterwards discovered, misled it into the belief that there were no obstructions to be encountered. In other words, this amounted to a warranty as to the conditions to be met by the plaintiff in the performance of its work. The Government contends that there was no misrepresentation, that obstacles met by the contractor were such that they could have been discovered upon a careful inspection of the site, that plaintiff had been notified in advance by the specifications that it was to make its own inspection, that the obstructions were unknown to both parties at the time of entering into the contract, and that as a result of all this the Government is not liable. Under the same specifications which required that the plaintiff should investigate the conditions under which the work was to be performed, the plaintiff was apprised of the fact that another contractor was then performing piling work. It was also aware, being an experienced contractor, of the manner in which such work is conducted. Its investigation may or may not have been adequate, but before entering actively upon the performance of the contract it was possible for plaintiff to ascertain whether the site had been cleared by the previous contractor. However, it took its chances as to obstructions which might have been left by the previous contractor and only discovered after work had been started that obstacles did exist. The Government had no more knowledge or means of acquiring knowledge of these obstructions than the plaintiff. The obstructions were such that neither of the parties to the contract knew or could have known of them without an investigation of the conditions after the completion of the original contract. This was just as much the duty of the plaintiff as of the defendant. It was a case of misfortune on the part of the plaintiff and not a case of misrepresentation on the part of the Government. When the bids were asked for and when the contract was entered into there was no knowledge on the part of the Government of any impediments. There was

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no misrepresentation of conditions or concealment of knowledge. As was said in the case of *MacArthur Brothers*, 258 U. S. 6:

> To hold the Government liable under such circumstances would make it insurer of uniformity of all work, and cast upon it responsibility for all the conditions which a contractor might encounter and make the cost of its projects always an unknown quantity. * * *.

The Government is not liable where no misrepresentation has been made, and there is no proof of anything in this case of a nature to mislead an ordinarily cautious contractor, or of any knowledge on the part of a Government official that would, if disclosed, have put the plaintiff upon notice of the obstacles encountered in the course of its work.

The petition is dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

AMERICAN GAS & ELECTRIC COMPANY AND AFFILIATED COMPANIES v. THE UNITED STATES

[No. 42074. Decided December 7, 1936. Judgment entered January 11, 1937[1]]

On the Proofs

Income tax; amortization of bond discounts and expenses; deduction for by corporation subsequently assuming liability for bonds; where liability assumed by merger or consolidation, and where by sale or transfer.—Deduction from gross income for amortization of loss from bond discounts and expenses of a corporation in the issuance of its bonds is allowable to a corporation subsequently assuming liability for such bonds where it was by merger or consolidation of the former corporation with the latter, but not where it was by sale or transfer of the property of the former corporation to the latter, without merger or consolidation.

[1] *Post*, p. 629.

Reporter's Statement of the Case

Same; transfer of right to deduction for amortization of bond discount and expenses.—The right of a corporation to deduction from gross income for amortization of bond discounts and expenses in the issuance of its bonds is a right of which the corporation could under certain circumstances avail itself, but not such a right as could be transferred by it to another by sale or otherwise, although it might continue to exist in cases where one corporation is merged with another.

Same.—The plaintiff held not entitled to deductions from gross income for the years 1926 and 1927, through an affiliated corporation, of unamortized bond discounts and expenses of another corporation in the issuance of its bonds liability for which was assumed by plaintiff's affiliate as the result of a series of nontaxable reorganizations under sections 203 and 204 of the Revenue Acts of 1924 and 1926, in some of which there was no merger or consolidation of the companies involved.

Deduction of difference between par value of bonds and redemption value above par.—Deduction from gross income by the taxpayer, as loss, of the difference between the par value of bonds of another corporation for which it had assumed liability and the callable price above par at which the bonds were subsequently redeemed by it, was allowable to the taxpayer in the determination of net taxable income, the same as deduction by a taxpayer of similar loss in such redemption of its own bonds.

The Reporter's statement of the case:

Mr. Thomas G. Haight for the plaintiff. *Messrs. Robert H. Montgomery* and *J. Marvin Haynes* were on the briefs.

Mr. James A. Cosgrove, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

The plaintiff, the American Gas & Electric Company, is a corporation having affiliated subsidiaries which are engaged in the manufacture and sale of electricity.

Plaintiff duly filed for itself and subsidiary corporations consolidated income tax returns showing $828,084.22 due for 1926 and $1,452,587.84 for 1927, which were duly paid.

Thereafter, the Commissioner of Internal Revenue determined that the additional amount of $571,716.25 together with interest thereon amounting to $155,784.39 was due for

the year 1926, and $801,146.67 taxes together with $170,-617.57 interest were due for the year 1927. The taxes and interest for 1926 were paid by the plaintiff by two checks, one dated August 19, 1931, for $504,591.78, and the other dated March 19, 1932, for $222,908.86. The taxes and interest for 1927 were paid by two checks, one dated August 19, 1931, for $660,813.70, and the other dated March 19, 1932, for $310,950.54.

The books of the American Gas & Electric Company as well as those of its subsidiary companies are kept on an accrual basis and the income tax returns for 1926 and 1927 filed in accordance therewith.

The Virginian Power Company (afterwards referred to herein as the Virginian Company) was a subsidiary of the plaintiff, and during the period involved herein the plaintiff owned 59,587 shares of the common stock out of the total outstanding of 73,036 shares. Of the preferred, plaintiff owned 400 shares out of 476, and of the prior preferred, 11,985 out of 32,500 shares.

The above common and preferred stock had full voting rights. The prior preferred stock had no voting rights unless four consecutive dividends were not paid on the stock. All dividends have been regularly paid on the said prior preferred stock.

The Appalachian Securities Corporation was organized by the American Gas & Electric Company on December 27, 1924. The corporation was formally organized at the first meeting of the Board of Directors held on January 3, 1925. A resolution was then passed authorizing the Appalachian Securities Corporation to acquire all the assets and assume all liabilities of The Virginian Power Company, and to issue in exchange therefor 82,000 shares of its first preferred stock. The certificates for 82,000 shares of first preferred stock were immediately issued by the Securities Corporation to the Virginian Company, and all assets and liabilities of the latter company were taken over by the Securities Corporation.

In February 1925 the Appalachian Power & Light Company, having been organized under the laws of the State of Virginia, entered into an agreement with the Appalachian Securities Corporation in occordance with which agreement

all the assets and liabilities which the last named corporation had acquired from the Virginian Company were transferred to the Appalachian Power & Light Company, and the Appalachian Power & Light Company issued to the Securities Corporation 1,000,000 shares of its common stock.

On February 17, 1925, the Appalachian Securities Corporation and the American Gas & Electric Company were consolidated, forming the American Gas & Electric Company. Under the consolidation certificate, the Virginian Power Company received 100,222 2/9 shares of American Gas & Electric Company preferred stock in exchange for the aforesaid 82,000 shares of first preferred stock of the Appalachian Securities Corporation, and as a result of the consolidation, the American Gas & Electric Company became the owner of all of the outstanding stock of the Appalachian Power & Light Company.

From time to time, subsequent to March 1, 1913, the Virginian Power Company had issued and sold bonds at a discount. Expenses were also incurred when these bonds were sold. The bond discount and expenses were placed upon the books of the Virginian Company as prepaid interest and each year the company charged to expenses a pro rata part of the discount and expenses. On the date the Securities Corporation, and later the Appalachian Power & Light Company, took over the assets and assumed all the liabilities of The Virginian Power Company, these companies placed upon their books as prepaid interest the unamortized discount and expenses which had been incurred in connection with the issuance and sale of bonds. The balances of discount and expenses which had not been charged to expenses by The Virginian Power Company and which were taken over and placed on the books of the Securities Corporation and later the Appalachian Power & Light Company, are as follows:

1—5s issued under mortgage and deed of trust, dated December 1, 1912	$1,221,208.05
1—6½s issued under mortgage and deed of trust, dated Jan. 1, 1924	651,791.07

The Appalachian Power & Light Company paid the interest on the Virginian Company bonds, which it had

assumed, and amortized the balance of the discount and expenses on the various issues in the same manner as had been followed by the Virginian Company. This practice was continued until March 31, 1926, when the Appalachian Power & Light Company merged into the Appalachian Electric Power Company, hereinafter described.

The Appalachian Power Company was organized on May 24, 1911, under the laws of the State of Virginia. From the date of its organization to March 31, 1926, when it merged with the Appalachian Electric Power Company, the company was engaged in the manufacture and sale of electricity also principally in the State of West Virginia.

By November 16, 1925, the American Gas & Electric Company had acquired and was the owner of more than 95 per cent of all classes of stock which had been issued by the Appalachian Power Company, and beginning with November 16, 1925, and up to the date of the merger, hereinafter described, this company was included in a consolidated federal income tax return of the American Gas & Electric Company and other affiliated companies.

On March 4, 1926, the Appalachian Electric Power Company was organized under the laws of the State of Virginia for the purpose of absorbing by merger the Appalachian Power Company and the Appalachian Power & Light Company.

On April 1, 1926, the effective date of the merger agreement, and April 15, 1926, the date the merger agreement was signed, the American Gas & Electric Company owned all of the issued and outstanding stock of the Appalachian Power & Light Company and Appalachian Electric Power Company, and nearly all of the stock of the Appalachian Power Company.

As of April 1, 1926, the Appalachian Power Company and the Appalachian Power & Light Company merged with the Appalachian Electric Power Company, and became known as and continued to do business under the name of the Appalachian Electric Power Company. This merger was accomplished in accordance with a merger agreement, dated April 15, 1926.

Prior to the merger with the Appalachian Electric Power Company, the Appalachian Power Company issued

and sold, subsequent to March 1, 1913, bonds at a discount. Expenses were also incurred when these bonds were sold. The bond discount and expenses were placed upon the books of the Appalachian Power Company as prepaid interest, and each year the Company charged to expenses a pro rata part of said discount and expenses. On the date the Appalachian Electric Power Company absorbed by merger the Appalachian Power Company and the Appalachian Power and Light Company, the former company took over all the assets and assumed all the liabilities of the two absorbed companies. The Appalachian Electric Power Company placed upon its books as prepaid interest the unamortized discount and expenses which had been incurred in connection with the issuance and sale of bonds under the aforesaid mortgages and indentures made by the Appalachian Power Company. The balances of discount and expenses on the various issues which had not been charged to expenses by the Appalachian Power Company as of the date of merger are as follows:

1st 5s due June 1, 1941	$914, 980. 56
7% Gold bonds due August 1, 1936	193, 865. 90
6% debentures due July 1, 2024	749, 867. 24

The foregoing amounts are the balances which were placed upon the books of the Appalachian Electric Power Company.

Under the merger agreement the Appalachian Electric Power Company also assumed the bonds of the Virginian Power Company which had just previously been assumed by the Appalachian Power & Light Company, one of the companies which merged into the Appalachian Electric Power Company. The Appalachian Electric Power Company placed upon its books as prepaid interest the balances of discount and expenses of the Virginian Power Company bonds which had not been charged to expenses by either the Virginian Power Company or the Appalachian Power & Light Company. The balances as of the date of merger of discount and expenses in connection with these bonds are as follows:

1st 5s due Dec. 1, 1942	$1, 142, 240. 58
1st lien 6½s due Jan. 1, 1954	629, 315. 61

The Appalachian Electric Power Company paid the interest on the bonds of the Virginian Power Company and those of the Appalachian Power Company. It also amortized the balances of the discount and expenses on the various issues of both companies in the same manner as had been followed by the Virginian Power Company and the Appalachian Power Company. This practice was followed in the years 1926 and 1927 and all subsequent years.

After the closing of the transaction whereby the Virginian Company contracted to transfer all of its assets and liabilities to the Appalachian Securities Corporation, both corporations treated the transaction as a non-taxable reorganization under sections 203 and 204 of the Revenue Act of 1924, and neither corporation reported a profit or loss therefrom in its 1925 Federal Income Tax Return. The Commissioner of Internal Revenue, after an examination and audit of the 1925 returns, treated the transaction in the same manner. Likewise, when the Securities Corporation caused the assets and liabilities to be transferred to the Appalachian Power & Light Company, which assets and liabilities had been acquired just previously from the Virginian Company, both corporations treated the transaction as a non-taxable reorganization under the aforesaid sections of the Revenue Act of 1924, and neither corporation reported a profit or loss therefrom on its 1925 Federal Income Tax Return. The Commissioner of Internal Revenue, after an examination and audit of the 1925 returns, treated the transaction in the same manner. Neither the Securities Corporation nor the Appalachian Power & Light Company increased or decreased any values on its books on account of the assets and liabilities acquired from the Virginian Company. In computing depreciation for Federal income tax purposes on the assets acquired, and the profit or loss on any sales subsequent to the dates of the transfers aforesaid, each corporation has used the cost to the Virginian Power Company. The depreciation deduction referred to hereinafter has been computed on the same basis.

When the Appalachian Electric Power Company, through the merger with the Appalachian Power Company and the Appalachian Power & Light Company, hereinbefore de-

scribed, acquired the assets and assumed the liabilities of the two latter companies, all three merging corporations treated the transaction as a non-taxable reorganization under sections 203 and 204 of the Revenue Act of 1926, and none of the corporations reported a profit or loss therefrom in its 1926 Federal Income Tax Return. The Commissioner of Internal Revenue, after an examination and audit of the said 1926 returns, treated the transaction in the same manner. When the assets and liabilities of these two companies were taken over, through the merger, by the Appalachian Electric Power Company, this company determined that the plants of the two companies had increased in market value by over $56,000,000 and they were placed on the books at this increased value; but no part of the increased value has been used in the determination of depreciation for tax purposes. The depreciation deduction referred to below has been computed on the basis of the cost to the Virginian Power Company for those assets which the Appalachian Power & Light Company had acquired from that company through the Appalachian Securities Corporation, and the depreciation on the assets, which were acquired through the merger from the Appalachian Power Company, has been computed on the basis of cost to that company. The profit or loss on any sales subsequent to the date of the merger has been determined on the same basis.

The parties agree that if the Court decides that the Appalachian Electric Power Company is entitled to deduct from the consolidated gross income the balances of unamortized bond discount and expenses which it took over when it assumed the various bond issues of the Virginian Power Company and the Appalachian Power Company, the following table sets forth the proper deductions for 1926 and 1927:

	1926	1927
Virginian Power Co., 1—5s due Dec. 1, 1942	$51,400.88	$79,522.53
Appalachian Power Co., 1—5s due June 1, 1941	79,996.64	72,620.39
Appalachian Power Co., 7% Gold bonds due Aug. 1, 1936	14,070 87	18,761.16
Appalachian Power Co., Gold debentures due July 1, 2024	5,724.10	7,632.24
	$151,192.49	$178,536.32

On April 1, 1926, there was outstanding $5,000,000 of 6½ per cent bonds which had been issued at a discount by the Virginian Power Company under the aforesaid mortgage and deed of trust, dated January 1, 1924. The Appalachian Electric Power Company, which had assumed these bonds under the aforesaid merger agreement, redeemed these bonds on April 1, 1926, at 105 per cent of par. In accordance with the terms of the mortgage and deed of trust, a premium of $250,000 was paid in connection with redemption of these bonds. The balance of the unamortized discount and expenses on these bonds amounted to $629,315.61.

On November 29, 1927, the directors of the Ohio Power Company directed that the outstanding bonds of a par value of $9,702,000, Series A, 7 per cent, be redeemed at 106 per cent of par in accordance with the mortgage and deed of trust, dated January 3, 1921. In order to obtain funds with which to redeem the said bonds, the Ohio Power Company borrowed $10,284,120 on December 12, 1927, from the American Gas & Electric Company, which company owned all of the common stock of the Ohio Power Company and 14,090 shares of non-voting preferred stock out of a total of 143,313 shares outstanding. On December 12, 1927, the Ohio Power Company paid to the Central Union Trust Company of New York, Trustee, the said $10,284,120 in redemption of the said Series A bonds. In due course, the bondholders were paid and the bonds were surrendered and cancelled by the Trustee. The premium paid to redeem these bonds amounted to $582,120, the difference between $10,284,120 and the par value of the bonds, $9,702,000. These bonds had been issued and sold during the year 1921 at a discount. On the date that the bonds were redeemed, the balance of unamortized discount and expenses, which had not been charged to expenses by the Ohio Power Company, amounted to $823,708.81.

The mortgage and deed of trust, dated January 3, 1921, under which the Series A, 7 per cent bonds had been issued and sold during 1921, also authorized the issuance of bonds of a different series. Pursuant to the terms of this mortgage and deed of trust, the Ohio Power Company on December 14, 1927, sold to Dillon, Read & Co., Series D 4½ per cent bonds of a par value $9,702,000. These bonds were sold to

the said bankers at a discount, or at 92 per cent of par. On December 14, 1927, the Ohio Power Company received from Dillon, Read & Co., $8,941,605.75, representing the proceeds from the sale of the Series D bonds. On the same date the above amount was paid to the American Gas & Electric Company and on the latter's books credited to the loan account of $10, 284, 120. The balance of the loan, $1,342,394.25, was paid subsequent to 1927 with interest.

Issues of fact involving depreciation deductions for the years 1926 and 1927 have been settled by agreement between the parties, and the result of the agreement is set forth in the Report of the Valuation Division of the Internal Revenue Bureau, which report is attached to the stipulation of the parties marked "Exhibit 14" and is made a part hereof by reference.

On June 15, 1932, the American Gas & Electric Company and affiliated companies filed with the Collector of Internal Revenue for the Second District, New York, New York, claims for refund for the calendar years 1926 and 1927 in the amounts of $725,500.64 and $971,764.24, respectively. The Commissioner of Internal Revenue has refused to pay said claims for refund and rejected the same on October 5, 1932. A letter from the Commissioner of Internal Revenue, datcd December 18, 1931, disclosed the manner in which the Commissioner computed the tax liability of the plaintiff and affiliated companies for the years 1926 and 1927 and fixed a deficiency of $422,862.93.

The court decided that plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the Court:

The plaintiff claims to have overpaid its tax for the years 1926 and 1927 and by reason thereof asks judgment in its petition for $1,699,264.88, with interest.

The Virginian Power Company was organized in 1912 and was part of a chain of operating companies controlled by the plaintiff. In 1924 the plaintiff organized the Appalachian Securities Corporation and in 1925 that corporation acquired all of the assets and assumed all of the liabilities, including bonds, of the Virginian Company in

exchange for 82,000 shares of its preferred stock. In the same year and somewhat later, the Appalachian Power & Light Company, which had been organized by the plaintiff, acquired all of the assets and assumed all of the liabilities, including bonds, of the Virginian Company which had been previously assumed by the Appalachian Securities Corporation. In exchange for this property, the Appalachian Power & Light Company issued and gave 1,000,000 shares of its common stock. Following this transaction, the Appalachian Securities Corporation and the American Gas & Electric Company were consolidated under the laws of the State of New York to form the American Gas & Electric Company. All of these transactions occurred in 1925.

By November 16, 1925, the American Gas & Electric Company had acquired more than 95 percent of all classes of stock in the Appalachian Power Company which had absorbed the operations of the Virginian Power Company. In 1926, the Appalachian Power & Light Company and the Appalachian Power Company were merged into one corporation forming the Appalachian Electric Power Company.

Both the Virginian Power Company and the Appalachian Power Company were originally subsidiaries of the plaintiff but the various reorganizations recited above left in their place only one subsidiary, the Appalachian Electric Power Company, manufacturing and selling electricity in West Virginia.

When the Virginian Power Company transferred all of its assets and liabilities, including bonds, to the Appalachian Securities Corporation, both corporations treated the transaction as a non-taxable reorganization under sections 203 and 204 of the revenue acts of 1924 and 1926, and neither corporation reported a profit or loss therefrom in its 1925 Federal income-tax return. The Commissioner of Internal Revenue, after examination, approved the returns. When the Securities Corporation caused the assets and liabilities which it had acquired from the Virginian Company to be transferred to the Appalachian Power & Light Company, both companies treated the transaction as a non-taxable reorganization and neither corporation reported a profit or loss on its 1925 Federal income-tax return. The Commis-

sioner approved the returns. Neither the Securities Corporation nor the Appalachian Power & Light Company increased or decreased any values on its books on account of the assets and liabilities acquired from the Virginian Company. In computing depreciation for Federal income tax purposes on the assets acquired and the profit or loss on any sale subsequent to the date of reorganization, each corporation has used the cost to the Virginian Power Company. The Commissioner of Internal Revenue in passing upon these matters computed the depreciation deduction on the same basis.

Both the Virginian Power Company and the Appalachian Power Company had issued and sold bonds at a discount, all of which had been issued prior to the reorganizations described above. The Appalachian Electric Power Company placed upon its books as prepaid interest the balances which had not been charged to expenses by either the Virginian Power Company, the Appalachian Power & Light Company, or the Appalachian Power Company. The Appalachian Electric Power Company, from the date it assumed the bonds, paid the interest on the bonds of the Virginian Power Company and those of the Appalachian Power Company. It also amortized the balances of the discount and expenses on the various issues of both companies in the same manner as had been followed by the Virginian Power Company and the Appalachian Power Company.

The parties have stipulated that if the court decides that the Appalachian Electric Power Company is entitled to continue to make the deduction for unamortized bond discount and expenses which it took over when it assumed the various bond issues of the Virginian Power Company and the Appalachian Power Company, the amounts of $151,-192.49 and $178,536.32 should be deducted for the years 1926 and 1927, respectively. The Commissioner refused to make any deduction for unamortized bond discount and expenses in the case of either company and computed the plaintiff's tax without giving it the benefit of any such allowance. The petition originally presented the question of the right of plaintiff to additional depreciation but this issue has been settled by agreement in the Bureau of Internal

Revenue and is no longer in controversy. Besides this, the petition sets out a claim based on the fact that the Ohio Power Company, a subsidiary of plaintiff, sold bonds at a discount which it subsequently redeemed at the callable price which was above par. The Commissioner refused to allow any deduction on account of this transaction but it is now conceded by defendant that his action in this respect was erroneous. The only questions left to be determined arise out of the transactions involving the bonds issued by the Virginian Power Company and the Appalachian Power Company.

It will be observed that the case involves several reorganizations and mergers. Prior to these reorganizations, both the Virginian Power Company and the Appalachian Power Company had issued and sold bonds at a discount. In the course of the reorganization proceedings these bonds were assumed by the companies that absorbed the prior organization and the question involved in the case is whether the plaintiff, under the facts in the case, is entitled to amortize the bond discount and expenses of a predecessor corporation and take a discount therefor in its income tax returns for 1926 and 1927. In this connection it will be observed that the circumstances with respect to the bonds and also as to the bond discount are different as to the bonds issued by the Virginian Power Company from those issued by the Appalachian Power Company. In both instances, however, the bonds came to the plaintiff through non-taxable reorganizations as contemplated by sections 203 and 204 of the revenue acts of 1924 and 1926.

The bonds of the Virginian Power Company were issued at a discount long prior to the various reorganizations, consolidations, and mergers involved in the case, and had the Virginian Company continued in existence as it was originally organized it would have been entitled to amortize the bond discount and take a deduction each year from gross income on account of such discount. *Helvering* v. *Union Pacific Co.*, 293 U. S. 282. The question is whether under all of the circumstances in the case the plaintiff stands in the shoes of the Virginian Power Company so as to be entitled to this deduction.

The Virginian Power Company was not affiliated with plaintiff, but plaintiff owned approximately 81 per cent of its stock, and while that condition existed caused the Appalachian Securities Corporation to be organized and have its stock issued to the Virginian Power Company for all of its assets, at the same time assuming all of its liabilities including the bonds in question. The Virginian Company continued in existence until some two years later when it was dissolved. There was another reorganization and merger before the bonds were finally assumed by the Appalachian Electric Power Company but these intermediate transactions were in the nature of consolidations or mergers and raise no additional issues. The distinguishing feature with reference to the bonds issued originally by the Virginian Power Company is that they did not become a liability of the Appalachian Electric Power Company by reason of a merger or consolidation with the issuing corporation but through a transaction in which the corporation issuing the bonds received stock for its property and as a part of the transaction the company taking over the property assumed the liability for the bonds. In other words, there was a transfer of the property of the Virginian Power Company and in consideration of this transfer the Appalachian Securities Corporation agreed to pay the bonds. Subsequently, the property was taken over in succession by the Appalachian Power & Light Company and the Appalachian Electric Power Company. The last corporation in the chain had no right to the deductions now claimed unless each of its predecessors in liability on the bonds had a similar right.

It is contended that if amortization is not allowed with respect to the bonds of the Virginian Company there will be a loss by reason of discount and expenses connected with the issuance of these bonds for which no one will be allowed a deduction. It is true there was a loss but it does not follow that the Appalachian Electric Power Company is entitled to a deduction by reason thereof. The weight of authority seems to be that in such cases where there has been a merger or consolidation of the corporation which originally issued the bonds with the corporation which subsequently assumes and becomes liable for them, the latter

is entitled to a deduction for the loss sustained by reason of this liability; but where there has been a sale or transfer of the property of the issuing corporation without a merger or consolidation with the corporation which assumes the payment of the bonds, then the successor corporation is not entitled to a deduction on account of the loss sustained by reason of the liability assumed.

The identical question now being considered was determined adversely to plaintiff in *American Gas & Electric Co.* v. *Commissioner*, 33 B. T. A. 471, 475, largely upon the authority of *Turner-Farber-Love Co.* v. *Commissioner*, 68 Fed. (2d) 416, in which the facts were parallel to those in the case at bar.

It is urged on behalf of plaintiff that in the case last cited it was held that there was a sale and that in the instant case there could have been no sale in the transaction between the Virginian Company and the Securities Corporation because no gain or loss was recognized either by the parties or by the Commissioner. But whether or not there was what might be téchnically called a sale, there certainly was a transfer. When the case of the *American Gas & Electric Co.* v. *Commissioner*, referred to above, was taken on appeal to the United States Circuit Court of Appeals for the Second Circuit that court held with reference to the transaction that "under section 203 (b) (4) of the revenue acts of 1924 and 1926 no gain or loss is to be recognized under the transfer", and it said further in its opinion, 85 Fed. (2d) 527, 530:

> Consequently, where there has been only a partial amortization of discount and expenses and a transfer in reorganization occurs, no further loss will be recognized, and that part of the loss which could not be taken prior to the transfer cannot be taken thereafter. While it might be more satisfactory to carry forward through the successor corporation actual unamortized losses incurred by the predecessor, we can find no warrant for this in the statute, regulations, or decisions of the courts.
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> [Citing *Turner-Farber-Love Co.* v. *Helvering*, *supra*; *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435; and *Athol Mfg. Co.* v. *Commissioner*, 54 Fed. (2d) 230.]

Counsel for plaintiff cites some cases which may appear to hold to the contrary but which are distinguished in the opinion from which the quotation above is taken.

It seems to be assumed by plaintiff that the right to a deduction on account of the bond discount was an asset which was transferred to the successor corporations. If it was an asset, it must have been such by reason of being a liability on the part of the Government, which clearly it was not. It was merely a contingent right of which under certain circumstances the corporation which issued the bonds could avail itself. But such a right can not be transferred to another by the party possessing it, although it may continue to exist in cases where one corporation is merged with another. The bonds were sold at a discount but at maturity the full face value would have to be paid and money in excess of that originally received must be made available therefor. The practice arose in bookkeeping of setting up bond discount as an asset and writing it off over a period of years by setting aside from income enough for each year so that when the bonds reached maturity the face value could be paid. But although set up as an asset it was more in the nature of an offset to the charge made on account of income set aside to meet the future payment of the bonds. As a matter of form in bookkeeping there may be no objection to the method used, but the manner in which the corporation kept its books has no bearing upon the question at issue. Plaintiff treats bond discount as an asset much the same as the value of plant or machinery and as the value of plant or machinery is carried forward in a nontaxable reorganization on the same basis to the successor corporation as existed in the case of the predecessor corporation, it is contended on behalf of the plaintiff that a like rule should apply to bond discount. What we have said above shows that bond discount and plant and machinery are not assets in the same sense of the word. Whatever may be the name applied to the transaction, the Securities Corporation acquired the assets of the Virginian Company by the payment of a definite consideration and we think it is a fair presumption that the price so paid was

adjusted to meet the fact that the corporation would have to pay the bonds in full.

Our conclusion is that both the weight of authority and the better reasoning are against the allowance of a deduction on account of the discount on the Virginian bonds, and the claim of the plaintiff in this respect is therefore denied.

The Commissioner also refused to allow any deduction on account of the discount on the bonds of the Appalachian Power Company. On the same facts, the Circuit Court of Appeals in *American Gas & Electric Co.* v. *Commissioner*, *supra*, held that there was a merger of the Appalachian Power Company in the Appalachian Electric Power Company which essentially preserved the identity of the transferor, citing several Virginia authorities in support of its conclusion as to the merger. Basing its final judgment upon the conclusion that there was a merger, the Circuit Court further held that the deduction should be allowed as to the bonds of the Appalachian Power Company. We concur in the opinion so rendered and follow it in holding in favor of the plaintiff on this point.

There remains one other issue between the parties to be determined. This arises out of the fact that on April 1, 1926, there was outstanding $5,000,000 of 6½ per cent bonds which had been issued at a discount by the Virginian Power Company. The Appalachian Electric Power Company which, as shown above, had assumed these bonds, redeemed them on the date last named at 105 per cent of par, and in accordance with the terms of the mortgage and deed of trust a premium of $250,000 was paid in connection with the redemption of these bonds. The plaintiff, through its affiliate the Appalachian Electric Power Company, seeks to deduct as a loss the difference between par and callable price at which the Virginian Power Company bonds were redeemed. This deduction the Commissioner refused to allow. The defendant insists that the right to deduct this loss belonged to the corporation which issued the bonds and argues that this right does not extend to a successor corporation which had acquired the property of the issuing corporation and assumed its liabilities. In other words, the defendant assumes that the question now under considera-

tion is the same as that arising by reason of the Virginian Company having sold its bonds at a discount. With this we do not agree, but think an entirely different issue is presented.

The right to a deduction on account of its bonds having been sold at a discount originated with the Virginian Company itself. It came into existence when the bonds were sold but we have held that this right did not pass to a successor company which acquired the property of the first corporation by purchase or transfer and assumed its liabilities. On the other hand, the right to the deduction by reason of having redeemed the bonds at a premium was not brought into existence by the Virginian Company. The right to call the bonds at a specified price was one that ran with the bonds and belonged to any party who assumed their payment. It was an entirely different right from that which arose by reason of having issued the bonds at a discount.

The right to claim a deduction on account of having redeemed the bonds at a price above par did not come into existence until the bonds were so redeemed and, as we think, belonged to the corporation making the payment. Clearly it was this corporation that sustained the loss.

That there was a right to deduction on account of such a loss we think has been settled by the Supreme Court. In *Helvering* v. *American Chicle Co.*, 291 U. S. 426, a corporation which had acquired all the assets and assumed the liabilities of another, and thereafter purchased in the open market some of the latter's bonds at less than their face value, was held to have realized a taxable gain in the difference between the face value of the bonds and the amount it paid for them. If, under such circumstances, the profit made is held to be that of the redeeming corporation, it is not only fair and just but logical to say that if, as in the case at bar, a loss resulted from the redemption, the loss must also be the loss of the corporation taking up the bonds, and it is entitled to a deduction by reason thereof. The defendant concedes that the Ohio Company is entitled to a deduction on account of having redeemed bonds which it had issued at a price above par. When the Appalachian Electric Power Company assumed the obligation of the bonds, it also

acquired the right to avail itself of the provision with reference to their redemption. We are unable to see that it was in any different position than it would have been had it issued the bonds in the first place, and consequently it has the same right to a deduction for the loss incurred as did the Ohio Company.

The Commissioner having erred in computing plaintiff's taxes by reason of failing to make the proper deduction on account of the discount on the bonds of the Appalachian Power Company, for the loss sustained by the Ohio Power Company in redeeming its bonds, and also for the loss sustained by the Appalachian Electric Power Company in taking up at a premium the bonds issued by the Virginian Company, it follows that plaintiff's taxes should be recomputed in accordance with this opinion, and judgment rendered in its favor for the amount found to be overpaid. If counsel for the respective parties can agree on the amount of the overpayment judgment will be entered in accordance with such agreement; otherwise the court will have the computation made and judgment entered for the amount found to be due.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

KARNO-SMITH COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 42803. Decided December 7, 1936]

On the Proofs

Contract for construction of Government building; damage to contractor by Government delay; lack of consideration for promise to forego claim.—The plaintiff, a contractor for Government construction work, is entitled to recover for damage sustained by it as a result of delay in the performance of the Government's obligations under the contract; and it is immaterial that the contractor, in subsequent unsuccessful negotiations to secure payment of other claims under the contract, stated that no claim was made for such damage.

Reporter's Statement of the Case

Damage from Government delay where contract time extended by Government.—The mere fact that the time for completion of the plaintiff's contract for Government construction work was extended because of delay caused by the Government does not relieve the Government of liability for damage sustained by plaintiff as a result of such delay.

Default by Government in its contractual obligations; liability to contractor for resulting damage.—Where the Government fails in carrying out its agreement to perform certain work or to furnish articles necessary to the performance of a Government contract, it is liable for actual damage sustained by the contractor as a result thereof.

Liability of Government for erroneous contract specifications.—The contractor in a Government contract had a right to assume that the specifications of the contract as drawn by the Government complied with the municipal code of the city in which the contract work was to be performed; and where they did not, and the contractor, under instructions from the contracting officer, and at an increased cost, modified and performed the work so as to comply with the municipal regulations, and the work and its benefits were accepted by the Government, the contractor was entitled to compensation for such increased cost.

Increased cost of contract work due to Government delay.—Where, under its contract with the Government for construction of a building, the plaintiff was required to furnish heat for protection of the work against cold over an increased period of time by reason of delay in completion of the work caused by the Government, it was entitled to compensation for the cost of such additional heat.

Decision of disputed question by specified Government officer; failure of officer to determine question; jurisdiction of court.—Where a Government contract properly provided for the determination of disputed questions by a specified Government officer, who, instead of deciding such questions, refers them to the Comptroller General for his decision, the Comptroller General's decision cannot be substituted for that of the officer designated by the contract, and the legal rights of the contractor are determinable by the court.

The Reporter's statement of the case:

Mr. Frederick Schwertner for the plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is a corporation organized and existing under the laws of the State of New Jersey. It was incorporated in 1920 and has been continuously engaged in the engineering and contracting business.

2. On September 12, 1931, a contract was entered into between the plaintiff and the defendant by which plaintiff agreed to furnish all labor and materials and perform all work required for construction of the United States Post Office building and Court House at Trenton, New Jersey, except elevators and foundations, for the sum of $749,500. The contract and specifications, made a part thereof, are filed in the case and made part hereof by reference. The contracting officer was Ferry K. Heath, Assistant Secretary of the Treasury.

The contract provided for completion within 480 calendar days after the date of receipt of notice to proceed. The contract provided also, in part, as follows:

> ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.
>
> ARTICLE 5. *Extras.*—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 9 of the contract gave the Government, in case of delay by the contractor in the agreed rate of performance, the option to terminate the right of the contractor to proceed, or to let the contractor continue, in which latter event the contractor should pay liquidated damages for the delay, ascertained as provided for, but was not to be charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes, and provided further, in words as follows:

> the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

It was also provided as follows:

> ARTICLE 15. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned whose decision shall be final and conclusive upon the parties hereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Article 12 of the General Requirements, made a part of the contract, provided:

> Bidders should fully inform themselves as to the location of the site and as to the conditions under which the work is to be done. Failure to take this precaution will not relieve the successful bidder from furnishing all material and labor necessary to complete the contract without additional cost to the Government.

3. Notice to proceed was received by the contractor September 24, 1931, fixing the final date for completion January 16, 1933.

The defendant furnished the site and concrete foundations for the building, which was to be a five-story structure, the exterior front and two sides of oolitic limestone and ornamental terra cotta, and the back principally of limestone and brick. All exterior limestone and terra cotta were to be backed with brick work to form a complete wall unit. The interior of the building was to consist principally of structural steel and reinforced concrete floors.

4. Shortly prior to commencing the work plaintiff prepared a schedule of its contemplated progress on each class of work, and furnished a copy to the defendant. Each of plaintiff's subcontractors was also furnished a copy and was required by the plaintiff to adhere to the schedule in his own particular work.

This schedule of progress plaintiff planned to adhere to, and it was an essential part of its contract arrangements, expected costs, and the amount of its bid. It showed that the structural steel work was to begin about September 25, 1931, and be completed in three months, or about December 25, 1931; that the limestone and brick work were to begin about January 4, 1932, and the terra cotta a day or two afterwards, limestone, brick, and terra cotta work to be finished about March 31, 1932. The schedule showed that all of the contract work was to be finished by the end of September 1932.

Plaintiff would and could have substantially adhered to this schedule had it not been for the delays encountered as hereinafter set forth.

5. The plaintiff had made all arrangements to secure the necessary structural steel and complete its erection by December 25, 1931, but it was hindered and delayed in the orderly progress of this work by reason of defects in the foundations that had been furnished by the defendant. The base plates were to be set in the concrete foundations preparatory to the erection of the structural steel. In setting the base plates, the plaintiff discovered that some of

the concrete foundations were from three to six inches, and two of them two feet, below the elevations shown on the contract drawings. The plaintiff protested to the defendant against the furnishing of defective concrete foundations, as it interfered with the orderly progress of the work. The plaintiff corrected the elevations of the concrete foundations by extending the steel columns with specially manufactured steel base plates of a sufficient thickness to overcome the deficiency in the height of the foundations. This corrective work was performed by the plaintiff and completed, along with the structural steel work, February 11, 1932. On February 24, 1932, the plaintiff submitted to the defendant a proposal for an additional $1,107.12 to cover the extra work in overcoming the difficulty and on March 18, 1932, the Assistant Secretary of the Treasury approved the proposal, allowing plaintiff an additional $1,107.12, and by reason of the delay involved, an extension of nine days in the time for completion of the contract, or to January 25, 1933. At the same time the Assistant Secretary granted plaintiff a further extension of four days to cover delay through dilatory inspection by the defendant's officer of certain structural steel, still further extending the time for completion to January 29, 1933.

The furnishing of defective foundations disorganized the orderly progress of the entire work in such manner as to delay the plaintiff on the whole project not less than 13 working days, entailing upon the plaintiff an additional expense of $1,635.01, not included in the allowance by defendant of the sum of $1,107.12 heretofore referred to and which would not otherwise have been incurred. Defendant has paid plaintiff the sum of $1,107.12, but has not paid plaintiff the additional $1,635.01 or any part thereof.

In a letter to the Supervising Architect dated March 13, 1933, in which claim was made for damages caused by defendant's failure to furnish models, to be hereinafter referred to, plaintiff stated as follows:

> Your attention is respectfully called to the fact that earlier in the job we requested and received credit for 13 days' delay caused through errors in

foundations furnished under another contract to the Government, and as these errors and consequent delays were unavoidable and unknown in advance, we make no claim for losses involved.

6. On October 9, 1931, the plaintiff advised the Supervising Architect that it had awarded the sub-contract for the manufacture of the terra cotta to the Atlantic Terra Cotta Company, and repeatedly thereafter requested the Supervising Architect to furnish full size drawings of the ornaments and plain and colored plaster models, indispensable for the manufacture of the terra cotta material, at the same time protesting against the delay of the defendant in furnishing them, and warning the defendant of the seriousness of the delays to be encountered in the construction of the exterior walls, of which the terra cotta formed a part. Under the prime contract it was incumbent upon the Government to furnish drawings and models for the terra cotta work and the terra cotta work could not be proceeded with without them. In its correspondence with the Supervising Architect on the subject, plaintiff claimed reimbursement for overhead expenses attributable to such delays.

The plaintiffs received from the Government the drawings and models referred to, receipt of the drawings extending from December 18, 1931, to February 6, 1932, and of the models from January 28, 1932, to May 10, 1932.

It was the plaintiff's plan of operation to install the ornamental terra cotta concurrently with the limestone, completing such work within three months after starting. (See Finding 4.) The plaintiff was unable to pursue this plan because the terra cotta was not available at the site of the job when needed, due to the delay of the defendant in furnishing the plaster models.

The plaintiff commenced the erection of the limestone on January 15, 1932. As a result of delay in furnishing the models the setting of the limestone and terra cotta was not completed until July 19, 1932.

On August 5, 1932, the plaintiff sent a letter to the Supervising Architect requesting an extension of 87 days by reason of the delay in furnishing the plaster models, and re-

newing its claim for overhead expenses incident to such delay at the rate of $194 per day. On January 26, 1933, the Supervising Architect granted an extension of 68 days for such delay, thus further extending the contract time for completion to April 7, 1933, but refused payment of overhead, naming the Comptroller General as his authority.

By reason of the delay in furnishing the plaster models the plaintiff suffered an actual delay of not less than 62 working days in the orderly progress of the work. Because of such delay the plaintiff incurred an additional overhead expense of $9,657.74, which has not been paid.

By reason of its inability to install the terra cotta concurrently with setting the limestone plaintiff incurred a further expense for special scaffolding of $984.34, for which it has not been reimbursed, and claim for which was first made known to the defendant after commencement of this suit.

7. The City of Trenton would not permit the plaintiff to construct the sidewalks, a part of the contract work, on East State Street and Carroll Street, in accordance with the contract specifications, because they did not meet the City's code requirements. The City of Trenton required the installation of a top course of concrete one inch thick, not required by the contract, over the four inches specified therein.

On September 15, 1932, plaintiff submitted to the Supervising Architect through the defendant's construction engineer a proposal in writing to construct the sidewalk in accordance with the city's requirements for $279 additional to the contract sum. The Construction engineer did not forward the proposal to the Supervising Architect but orally directed the plaintiff to do this additional work and assured plaintiff that he would recommend payment to the Supervising Architect. The plaintiff furnished the necessary labor and material in laying the required top course at an additional expense of $279, which was the reasonable value thereof. No further action was taken to collect this claim until it was asserted after the filing of this suit. This additional work was accepted by the defendant and plaintiff has not been paid for the same.

Reporter's Statement of the Case

8. Included in the contract work was the construction of a curb on East State Street and Carroll Street. The City of Trenton would not permit the plaintiff to construct the curb in accordance with the contract specifications, because they did not meet the city's code requirements, and required the installation of a concrete U-shaped pocket to receive the curb.

Under its contract with the defendant the plaintiff was required to install a concrete coping along the property lines on the North and West sides of the building. This served as a miniature retaining wall of the ground and separated the defendant's property from that of the adjoining owners. Under the contract this concrete coping was to be set in a sub-base of clean gravel, clinkers, or broken stone. In making preparations for the installation of the concrete coping it was discovered that such a sub-base was not only not suitable, but did not meet the requirements of the city code, and that the coping had to be permanently anchored to withstand the pressure of the earth under the action of the elements.

On August 31, 1932, the plaintiff submitted a proposal, in conformance with the requirements of the City of Trenton to the Supervising Architect, through defendant's construction engineer, to furnish the necessary labor and materials for these two pieces of work at a detailed total cost of $530.15. On September 26, 1932, the construction engineer forwarded to the Supervising Architect plaintiff's proposal and recommended that the same be accepted.

The construction engineer orally directed the plaintiff to do this work and stated to plaintiff that he would recommend payment to the Supervising Architect. The plaintiff furnished the necessary labor and materials in installing the pocket for the curb at an additional expense of $370.21 and the sub-base for the coping at an additional expense of $159.94, which were the reasonable values thereof.

On January 6, 1933, the Supervising Architect wrote the construction engineer a letter directing the rejection of plaintiff's proposal submitted August 31, 1932. The defendant accepted these two pieces of work and plaintiff

has not received payment for them. No further action was taken on these two claims until after this suit was instituted.

9. Paragraph 30 of the contract specifications provided:

> The contractor shall provide temporary heat as necessary to protect all work and materials against injury from dampness and cold, to the satisfaction of the Construction Engineer.

Under protest the plaintiff furnished temporary heat for a period of 30 days from November 15, 1932, to December 14, 1932, on which latter date the defendant started to supply the heat for the building upon its occupancy by the U. S. Post Office. The plaintiff incurred an additional expense of $1,200 for this temporary heat. The necessity for this heat was due solely to the delay caused by the defendant in furnishing defective foundations and failure promptly to furnish plaster models. On May 12, 1932, the plaintiff made a claim for temporary heating when it became evident that by reason of the delay in furnishing plaster models winter construction might become necessary, and repeated this claim on August 5, 1932, and February 4, 1933. On February 17, 1933, the Supervising Architect suggested to the plaintiff that it submit a proposal covering the cost of temporary heat, and on February 18, 1933, the plaintiff submitted its proposal in the amount of $1,200. The claim was investigated by the Supervising Architect and the amount thereof ascertained by him to be correct. On August 8, 1933, the Supervising Architect advised the plaintiff that its proposal for temporary heat in the amount of $1,200 had been referred to the Comptroller General, who disallowed the claim. After plaintiff had been so advised, it made no further effort to collect this claim until the filing of this suit.

10. Plaintiff completed all its contract work in or about the month of February 1933.

11. During the period March 7, 1932, to February 27, 1933, the defendant ordered extras in the total amount of $17,477.40, none of which is included in the claims in suit. During the period February 26, 1932, to January 19, 1933,

the plaintiff allowed the defendant deductions of $1,087.12 from the contract price for other changes in the work.

The defendant has paid to the plaintiff under plaintiff's protest the sum of $765,890.28, consisting of the contract price of $749,500, plus additions of $17,477.40, less deductions of $1,087.12.

The court decided that plaintiff was entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

The plaintiff on September 12, 1931, entered into a contract with the defendant by which the plaintiff agreed to furnish all labor and materials and to perform all work required for the construction of the United States Post Office Building and Court House at Trenton, New Jersey, except elevators and foundations, for the sum of $749,500 according to specifications, schedules, and drawings which were made a part of the contract. The building was to be completed within 480 calendar days after the date of receipt of the notice to proceed. On September 24, 1931, the plaintiff was notified to proceed, which fixed the date of final completion as January 16, 1933. The defendant furnished the site and also the concrete foundations for the building, which was to be a five-story structure, with the exterior front and two sides of oolitic limestone and ornamental terra cotta, and the back principally of limestone and brick. The interior of the building was to be constructed principally of structural steel and reinforced concrete floors.

Shortly prior to the commencing of the work, the plaintiff prepared a schedule of its contemplated progress of each class of work and furnished a copy of it to the defendant. Each of plaintiff's subcontractors was also furnished a copy and was required by the plaintiff to adhere to the schedule of his own particular work. This schedule of progress plaintiff planned to adhere to and it was an essential part of the contract arrangements, expected cost, and the amount of its bid. Under this progress schedule the steel work was to begin on September 25, 1931, and be completed in three months; the limestone and brick work were to begin about January 4, 1932; the terra cotta work a day or two afterwards; and the limestone, brick, and terra cotta work were

to be finished the end of March 1932. The schedule showed that all of the contract work was to be finished by the end of September 1932. The facts show that the plaintiff would and could have substantially adhered to this schedule had it not been for the delays caused by the defendant. The building was completed and accepted by the defendant in the early part of February 1933, and the plaintiff has been paid the contract price together with certain extras which are not in dispute, but the plaintiff reserved its rights in reference to the items herein enumerated for which it claims remuneration.

The plaintiff's claims fall into two classes. The first is for damages caused the plaintiff due to the fact that the defendant delayed the plaintiff in the completion of the work. The second class consists of items for extra work performed under the terms of the contract for which the plaintiff claims additional compensation.

The Government agreed to furnish the foundations but when the plaintiff entered upon the work it was found that the foundations were out of place from three inches to two feet. The Government employed the plaintiff to correct these errors and defects and paid the plaintiff for this work and allowed an extension of time of 13 days for the completion of the contract. During these 13 days, while the foundations were being put in proper alignment, the plaintiff was prevented from proceeding with its work and the orderly progress of its work was thrown out of schedule; the superintendent, the plant, and the workmen were idle; and an additional expense was placed upon the plaintiff in the sum of $1,635.01. It is too well established to require citation of authority that the Government can be required to make compensation to a contractor for damages which he has actually sustained by defendant's default in its performance of its undertaking to him. *United States* v. *Smith*, 94 U. S. 214. The defendant does not deny this proposition but contends as a defense that the plaintiff in March 1933, wrote a letter to the defendant in which it stated that no claim for loss would be made on this item. At that time the contract had been completed and the plaintiff was en-

deavoring to obtain a settlement of its outstanding claims against the Government. None of its claims was allowed. It is sufficient to say that there was no consideration for this surrender and it was made solely in an attempt to arrive at a settlement. The mere fact that the Government had granted an extension of time for the completion of the contract, due to the fact that it had delayed the plaintiff, does not relieve it of the responsibility for the damages incurred by the plaintiff due to these delays. *Edge Moor Iron Company* v. *United States*, 61 C. Cls. 392; and *Julius Goldstone et al.* v. *United States*, 61 C. Cls. 401. The plaintiff is entitled to recover on this item.

About a month after the plaintiff had entered upon the work, it notified the defendant of the subcontractor to whom it had given the contract for the manufacture of the terra cotta and requested that full size drawings for and models of ornamental, plain, and colored plaster for the terra cotta work for the exterior of the building, which were to be furnished by the Government, be delivered to its subcontractor. The defendant delayed in furnishing these drawings and models and the plaintiff repeatedly protested against the unreasonable delays and warned the defendant of the loss which would result, stating that it would hold the defendant for reimbursement of all damages it sustained by reason of the Government's failure to furnish them. The Government admits that it delayed the plaintiff 62 days in the furnishing of these drawings and models and granted an extension of time for the completion of the contract for this period. Owing to the disruption of its progress schedule and the idleness of its force of workmen and plant, the plaintiff incurred an additional overhead expense of $9,657.74. In addition to this overhead, the plaintiff had contracted with its subcontractor, who had the contract for the placing of the limestone front, for the use of its scaffolding for the purpose of putting in place the terra cotta work. Owing to the delay of the Government in furnishing the drawings and models for the terra cotta work, the limestone had been placed in position and the scaffolding had been removed, and the plaintiff was put to the additional expense of erecting a new scaffolding in the sum of $984.34.

Opinion of the Court

Where the Government agrees to perform a certain work or to furnish certain articles and fails to carry out its part of the contract, it is liable for the actual damages resulting from its failure to perform. It is too obvious to need argument that the Government is responsible for the actual damages occasioned by the delay in furnishing these drawings and models. The cost of the new scaffolding is a part of the damages suffered and is includable in the amount plaintiff is entitled to recover, occasioned by the delay of the defendant. The plaintiff is entitled to be reimbursed the amount of $10,642.08, being the actual damage sustained.

We next come to the three items which are for work within the terms of the contract but for which the plaintiff claims extra compensation by reason of the fact that the specifications furnished by the Government did not comply with the code requirements of the city of Trenton. In all three instances the claims are under $500 and therefore do not require authorization in writing. We do not feel that it is necessary to state the facts in each of these items as they are fully set out in the special findings of fact and, therefore, it is only necessary to say that the plaintiff had the right to assume that the specifications as drawn by the Government complied with the municipal code of the city in which the building was to be erected and the contractor could not be expected to violate a law of the municipality in order to keep within the specifications of the contract. In each instance, the contracting officer's representative orally instructed the plaintiff to comply with the municipal code, but in each instance payment was subsequently refused for the extra work performed. Upon the completion of the building, this work was accepted by the Government and the Government has received the benefit of it. The plaintiff is entitled to recover these three items, amounting to $279.00, $370.21, and $159.94, or a total of $809.15. *Suburban Contracting Company* v. *United States*, 76 C. Cls. 533; *Venable Construction Company* v. *United States*, 114 Fed. 763; and *Griffiths* v. *United States*, 77 C. Cls. 542.

The next claim made by the plaintiff is for the furnishing of heat for 30 days from November 15 to December 14,

1932, in the sum of $1,200. The plaintiff had contracted to furnish temporary heat as necessary to protect all work and material against injury and cold weather, and when called on to furnish heat for the period above mentioned it protested but supplied the heat. The contention is made that, if the Government had not delayed the plaintiff 13 days in the preparation of the foundations and the 62 days in furnishing the drawings for the terra cotta work, the building would have been completed before the cold weather had set in and therefore the heat would have been unnecessary. The facts clearly show that the necessity for the furnishing of this heat arose because of the delays occasioned by the defendant and without these delays the building would have been completed and turned over to the Government before cold weather had set in and the plaintiff would not have been called upon to furnish this heat. A claim was made for the reimbursement of this additional expense, investigated by the Supervising Architect and referred by him to the Comptroller General, who disallowed it. It was the duty of the Supervising Architect under the terms of the contract as representative of the contracting officer to make a decision on the merits of the claim. The Comptroller General was not a party to the contract, and his decision amounted to a nullity. Where the contracting officer fails to perform the duties imposed upon him by the contract, it is the duty of the court to perform this service and pass on the legal rights of the plaintiff.

In our opinion, the furnishing of this temporary heat by the plaintiff would have been unnecessary if plaintiff had not been delayed by the Government in the performance of its work, and, having been delayed by the Government, it is entitled to recover the actual damages it has sustained, which in this case is the additional expense it has incurred. The plaintiff is entitled to recover on this item the sum of $1,200.

Plaintiff is entitled to a judgment in the sum of $14,286.24. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

HARNISCHFEGER CORPORATION v. THE UNITED STATES

[No. 42099. Decided December 7, 1936]

On the Proofs

Income tax, interest on overpayment; crediting of overpayments on deficiency tax, and adjustment of interest accordingly.—The plaintiff in response to a 60-day letter from the Commissioner of Internal Revenue in March, 1927 informing it of overassessments of its income taxes for 1918 and 1919 amounting to $81,836.55, and a proposed deficiency of $100,442.20 for 1920, sent its check to the Commissioner, in advance for the amount of the proposed deficiency, from which, however, it immediately appealed to the Board of Tax Appeals. The Commissioner informed plaintiff that the $100,442.20 advance payment would be treated as a cash bond pending determination of the proposed deficiency, refused plaintiff's request for refund of the 1918 and 1919 overassessments, and informed it that they would be credited upon the 1920 deficiency, when finally determined; but later, before such final determination, refunded to plaintiff, on irregular informal overassessment schedules, the amount of such overassessments, without interest, with the express statement that interest would not be adjusted until after final determination of the 1920 deficiency. Upon final affirmative determination of the deficiency the overpayments were credited thereon by the Commissioner as provided for by section 284 (a) of the Revenue Act of 1926, and interest adjusted accordingly. *Held*, that the Commissioner's action in the crediting of the overpayments and adjustment of interest was a correct and valid settlement of plaintiff's tax accounts for the years involved. The case of *Libby, McNeill & Libby* v. *United States* distinguished.

The Reporter's statement of the case:

Mr. Allen H. Gardner for the plaintiff. *Morris, KixMiller & Baar*, and *Mr. Arnold R. Baar* were on the briefs.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is a corporation duly organized and existing under the laws of the State of Wisconsin, with its principal office in Milwaukee, Wisconsin.

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Prior to December 2, 1924, the name of plaintiff was Pawling & Harnischfeger Company. On said date, the plaintiff legally changed its name to Harnischfeger Corporation.

2. On March 14, 1919, the plaintiff filed a tentative return for the year 1918, disclosing an estimated tax of $1,250,000, of which amount $312,500.00 was paid on the date the return was filed. An extension to July 1, 1919, having been granted within which to file the completed return, the plaintiff, on June 15, 1919, paid a second installment in the amount of $312,500.00. On June 30, 1919, the completed return was filed disclosing a tax liability of $1,008,348.27, which amount was assessed in due time and course. The balance of the tax due in the amount of $383,348.27 was paid on the following dates:

September 15, 1919	$131, 261. 20
December 15, 1919	154, 357. 14
January 31, 1920	97, 729. 93
Total	383, 348. 27

Penalty and interest in the amount of $586.38 due on the final installment for failure to pay the same on December 15, 1919, was paid on January 31, 1920.

3. On March 16, 1920, the plaintiff filed a tentative return for the year 1919, disclosing an estimated tax of $142,090.49, of which amount $35,522.62 was paid on the date the return was filed. On June 15, 1920, the completed return was filed, disclosing a tax liability of $148,183.06, which amount was assessed in due time and course. The balance of the tax due in the amount of $112,660.44 was paid on the following dates:

June 26, 1920	$38, 568. 91
September 26, 1920	37, 045. 77
December 17, 1920	37, 045. 76
Total	112, 660. 44

Penalty and interest in the amount of $22.84 due on the first installment for failure to pay one-fourth of the tax

disclosed in the final return was paid at the time of the payment of the third installment on September 26, 1920.

4. On March 16, 1921, the plaintiff filed a tentative return for the year 1920, disclosing an estimated tax of $110,025.58, of which amount $27,506.40 was paid on the date the return was filed. On April 15, 1921, the completed return was filed disclosing a tax liability of $119,997.75, which amount was assessed in due time and course. The balance of the tax due in the amount of $92,491.35, was paid on the following dates:

April 15, 1921	$2,493.03
June 17, 1921	29,999.44
September 17, 1921	29,999.44
December 15, 1921	29,999.44
Total	92,491.35

Penalty and interest in the amount of $12.46 due on the first installment for failure to pay one-fourth of the tax disclosed in the final return was paid on April 15, 1921.

5. After an examination and audit of plaintiff's tax liability for the year 1918, the Commissioner of Internal Revenue determined a deficiency for that year and on May 11, 1920, made an additional assessment against the plaintiff in the amount of $479,190.98. After notice and demand for payment made May 19, 1920, the plaintiff on May 28, 1920, filed a claim for the abatement of the total amount of $479,190.98.

6. After a further examination and audit of plaintiff's income and profits tax returns for the years 1918 and 1919, the Commissioner of Internal Revenue determined an overassessment in favor of plaintiff for the year 1918 in the amount of $365,830.27, and determined a deficiency for the year 1919 in the amount of $120,381.03.

7. The deficiency for the year 1919 in the amount of $120,381.03 was assessed by the Commissioner on November 29, 1922. The overassessment for 1918 in the amount of $365,830.27 was made the basis of a schedule of overassessments, which was transmitted to the collector and the amount thereof abated on December 9, 1922. On December

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21, 1922, the collector gave notice and demand for the payment of the unpaid balance of the additional tax for 1918 covered by the claim in abatement amounting to $113,360.71, together with interest thereon, and the additional tax for the year 1919 assessed in November 1922 in the amount of $120,381.03. The additional tax for the year 1918 was paid on December 28, 1922. The additional tax for the year 1919 and interest in the amount of $17,497.91 due on the rejected portion of the claim in abatement for the year 1918 was paid on January 6, 1923.

8. Claims for refund for the years 1918 and 1919 were filed by plaintiff on March 18, 1926, in the amounts of $113,360.71 and $120,381.03, respectively. An assessment waiver for the year 1920 was filed on December 1, 1925, extending the time for assessment to December 31, 1927.

9. After a further examination and audit of plaintiff's income and profits tax returns for the years 1918 and 1919, and an examination of plaintiff's income and profits tax return for the year 1920, the Commissioner of Internal Revenue in a letter dated January 13, 1927, notified the plaintiff of his further redeterminations resulting in overassessments for the years 1918 and 1919 in the amounts of $80,072.44 and $1,764.11, respectively, and a deficiency for the year 1920 in the amount of $100,442.20. The letter gave plaintiff 30 days in which to protest against the deficiency and also advised plaintiff that in the event protest was filed and the Commissioner finally determined there was a deficiency plaintiff would be advised by registered mail of such determination and given an opportunity to file a petition with the United States Board of Tax Appeals with respect to the deficiency shown. In the letter the following statement was made:

> The overassessments shown above will be scheduled in the form of certificates of overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 284 (a) of the Revenue Act of 1926.

10. In a 60-day letter dated March 16, 1927, the Commissioner advised plaintiff that the conclusions set forth in the letter of January 13, 1927, were sustained for the three years mentioned therein, thus showing overassessments of $80,072.44 and $1,764.11 for 1918 and 1919, respectively, and a deficiency of $100,442.20 for 1920. The letter further advised plaintiff of his right of appeal to the Board of Tax Appeals under Section 274 (a) of the revenue act of 1926 but stated that such right of appeal applied only to the deficiency for 1920.

11. On May 13, 1927, the plaintiff, by check dated May 12, 1927, paid an amount of $100,442.20 to the collector of internal revenue at Milwaukee, Wisconsin. The check, bearing number 24726, contained the printed direction on the reverse side: "This check is hereby accepted in full payment of the account as stated in voucher bearing corresponding number." There accompanied the check a voucher, number 24726, referring to the proposed 1920 deficiency in tax amounting to $100,442.20. This amount was credited to plaintiff in the collector's 9 D suspense account and the card record endorsed "Pending outcome of correspondence with Commissioner." The 9 D suspense account is an account in the collector's office in which payments received prior to receipt of formal assessment lists are carried until such assessment lists are sent from the Commissioner's office. The card record of this payment in the collector's office is as follows:

[Front]

Pmt. rec's. 5/13/27

Oct. 19, 1927
1927–Oct. 52C #2
(Yr. 1920)

Pawling & Harnischfeger Co.
38th & National Aves
Milwaukee, Wis.

DPFY

Transferred to Unidentified #9D 100442.20

Pending outcome of correspondence with Commissioner.

500007

IDENTIFIED____________________ JAN 27 1928.

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[Back]

Mim. #138	PAID UNDER PROTEST Rec'd 5/13/27
	Cash 1494
HARNISCHFEGER CO.	M. O. (No.)
Name	Check (No.) 13358 5/12/27
FORMERLY PAWLING & H. Co.	
Address	
MILWAUKEE #7422	100,442.20
City	Amount
RAR– 1920– IT – E – SM – 60 D	
Class of Tax and Periods	
IDENTIFIED	OCT 12 1927.
9 D	1927 – Oct. 52c #2 pt. I
PFY	Yr. 1920

12. On May 14, 1927, plaintiff filed with the United States Board of Tax Appeals a petition wherein it protested the Commissioner's final determination of its tax liability for the year 1920, as shown in the sixty-day letter dated March 16, 1927. The answer of the Commissioner was filed with the Board by the General Counsel, Bureau of Internal Revenue, on July 12, 1927.

13. May 24, 1927, at a conference with a representative of the Commissioner, plaintiff requested the scheduling of the overassessments for 1918 and 1919 referred to in the letters of January 13 and March 16, 1927, and refund of the amounts shown therein with interest. At that time the Commissioner refused to accede to plaintiff's request but gave plaintiff an opportunity to submit a memorandum in support of its request. June 1, 1927, plaintiff's representative submitted such a memorandum, which read in part as follows:

> In accordance with conference with Mr. Sherwood on May 24, 1925, the following memorandum is submitted as to the right of the above taxpayer to refund of principal amounts and interest on account of overassessments determined by the Commissioner with respect to the years 1918 and 1919.
>
> By Bureau letter of January 13, 1927, the Bureau of Internal Revenue determined that there had been

an overassessment for the year 1918 of $80,072.44 of $1,764.11 for 1919 and that there existed a deficiency for the year 1920 of $100,442.20. This last proposed deficiency was proposed instead of a deficiency in the amount of $104,569.78 which had been previously proposed. It was stated in substance in the letter of January 13, 1927, that the certificates of overassessment on the years 1918 and 1919 would be forwarded to the Collector and that the taxpayer would be notified in the usual course. The taxpayer was also notified in said letter that it had no appeal except as the letter stated a deficiency. Consequently, the taxpayer's protest was entered only as to the deficiency for the year 1920 and such protest was forwarded on January 29, 1927. Conference was had on February 17, 1927, and on March 16, 1927, the taxpayer was in receipt of a sixty-day letter refusing to change the proposed deficiency for 1920 in the amount of $100,442.20, such refusal resulting from the refusal to grant special assessment.

The taxpayer's representatives at all times since the letter of January 13, 1927, have asked that the certificates of overassessment be forwarded and that refund be made, no amount being outstanding upon the Collector's books at Milwaukee, or at any other place. In answer to such requests representatives of the Bureau advised that the Act of March 3, 1875, prevented the issuance of certificates of overassessment when there was a proposed deficiency outstanding.

* * * * *

While the taxpayer's representatives did not believe, and do not believe now, that such act is applicable or authorizes the withholding of refunds since a proposed deficiency, as to which a right of appeal to the Board of Tax Appeals is given, is very different from an "indebtedness" or "debt", it was forced to assent to the Bureau's position and in order to make clear its right to refund of the taxes for 1918 and 1919 it paid to the Collector of Internal Revenue at Milwaukee, Wisconsin, the proposed deficiency of $100,442.20, together with interest at the rate of 6% per annum from February 26, 1926, until the date of payment.

It is submitted that no reason now exists or can exist which will justify the withholding of the refunds for 1918 and 1919. Inasmuch as the amount of the refund for 1918 exceeds $75,000 and must be referred to the Joint Congressional Committee before payment can be

> made, it is requested that action be expedited inasmuch as five months have already elapsed since the allowance of the overassessments.

June 23, 1927, the Commissioner replied to plaintiff's letter of June 1st as follows:

> Reference is made to a letter dated June 1, 1927, from Kixmiller and Baar in which request is made for the refund of overassessments of income tax for the years 1918 and 1919 determined in favor of the above-named taxpayer, the basis for such request being that an amount equal to the proposed deficiency for 1920 has been deposited with the Collector of Internal Revenue and that the Commissioner is, therefore, prohibited from applying the amounts overassessed as credits against any deficiency ultimately assessed. The taxpayer's expressed opinion that the deficiency determined by the Commissioner with respect to the year 1920 does not constitute an indebtedness under the terms of the Act of March 3, 1875, and that, therefore, the Secretary of the Treasury may not, under that Act, withhold payment of amounts, determined to have been overpaid for the years 1918 and 1919, has been noted.
>
> It is the view of this office that inasmuch as the taxpayer has availed itself of all rights and privileges accruing to it under Section 274 of the Revenue Act of 1926 with respect to deficiencies determined by the Commissioner, thereby depriving the Commissioner of the right to assess and collect the tax determined to be due, until such time as the United States Board of Tax Appeals shall have rendered final decision as to the tax liability for the year involved, the taxpayer is precluded from making any payment prior to the assessment of the tax and the issuance of Notice and Demand for same. The money so deposited, however, will be held as a cash bond, pending final action by the Board with regard to the year 1920, and the overassessments found due for 1918 and 1919 will be scheduled for allowance, without interest, at the earliest practicable date.
>
> When the case has been finally closed for all years involved, the taxpayer's rights with regard to interest will be considered and any adjustment found due will be made at that time.

14. On June 20, 1927, the Commissioner approved a schedule of overassessments, form 7920, known and desig-

nated as Schedule IT:25920, embracing, among others, overassessments in favor of the plaintiff for the year 1918 in the amount of $80,072.44, and for the year 1919 in the amount of $1,764.11. This schedule was transmitted to the collector for appropriate action in accordance with the directions appearing thereon.

July 9, 1927, the Commissioner wrote the collector as follows:

> Reference is made to your letter dated June 29, 1927, and to the attached Schedule #25920, and Certificates of Overassessment covering overpayments of income tax for the years 1918 and 1919, issued in favor of the above-named taxpayer.
>
> The overassessments hereby allowed were a part of an adjustment which included a proposed deficiency for 1920 amounting to $100,442.20. It appears that on May 13, 1927, the taxpayer deposited with you an amount equal to the proposed deficiency, apparently, as before stated, to prevent the payment of such tax by credit from the overassessments found due for 1918 and 1919, and to enforce the refund, with interest, of such overassessments.
>
> After consideration of all facts pertaining to the case, it is proposed that the amount paid be held as a cash bond pending final decision by the United States Board of Tax Appeals as to the tax liability for the year 1920, and that the overassessments for 1918 and 1919, be scheduled for immediate allowance. The overassessments should be adjusted in accordance with regular procedure, without regard to the proposed deficiency for 1920. No adjustment of interest on the amounts overassessed will be made until the case has been finally closed for all years involved.
>
> The action taken in this case is not to be considered as a precedent and does not establish the taxpayer's right in any other instance to receive a refund while there is an apparent deficiency for another year.

In connection with consideration of the schedule of overassessments the collector not only determined that the overassessments shown therein were overpayments, but also that plaintiff was entitled to an overpayment on account of interest of $17,497.91 which had been paid on the rejected portion of a claim for abatement for 1918. (See Finding 7.)

The collector accordingly prepared a "Notice of Refund" of a proportionate part of that interest, the notice reading as follows:

> Taxpayer paid interest in the amount of $17,497.91 on a rejected claim in the amount of $113,360.71 for the year 1918. The Commissioner has now found an overassessment of $80,072.44 for that year, Schedule IT: A: 25920, and therefore, the same proportion of interest should be refundable.
> The computation is as follows:
> $80,072.44:113,360.71::x:17,497.91=$12,359.66.

15. On July 18, 1927, and pursuant to instructions from the Commissioner, the collector signed and returned the schedule of overassessments referred to in finding 14 herein, after increasing the amount thereof to $94,196.21 by adding the interest item of $12,359.66 set out in the notice of refund referred to in finding 14 herein. The schedule showed the amount of $94,196.21 to be refundable.

16. Certificates of overassessment for the years 1918 and 1919 showing that the amounts of $80,072.44 and $1,764.11, respectively, were refundable, together with notice of refund of interest for 1918 in the amount of $12,359.66, were submitted to the joint committee on February 10, 1928, accompanied by a letter of that date advising that the sixty-day period during which the refund would be withheld would expire on April 10, 1928. A check for the full amount of $94,196.21 was mailed to the collector by the disbursing clerk of the Treasury Department on April 12, 1928, and was thereafter delivered to the plaintiff.

The printed portion of the certificate-of-overassessment forms which were used in this instance had deleted therefrom the sentence which read as follows:

> Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit,

and the schedule of overassessments was prepared consistent therewith, no interest allowable on the overpayments appearing thereon when finally certified by the Comptroller General for payment. No interest was paid on the overpayments, the interest adjustment being finally made, as here-

inafter shown, on the basis of an application of the overpayments for 1918 and 1919 in partial satisfaction of the deficiency for 1920.

17. The Commissioner of Internal Revenue in October 1927, made an assessment on his October 1927 #2 list, page 5, line 2, of the asserted deficiency for 1920 amounting to $100,442.20, together with interest of $7,311.64 computed on said deficiency at six per centum per annum from February 26, 1926, to May 13, 1927. Thereafter, on November 9, 1927, the Commissioner instructed the collector that the assessment of deficiency and interest should be eliminated by a certificate of allowance which would be scheduled to his office for abatement. A certificate of overassessment for $107,753.84 was adjusted as an abatement on schedule IT 27699, dated November 18, 1927.

18. September 25, 1929, plaintiff requested certain information as to the manner in which the payment of $100,442.20 for 1920 had been handled on the collector's books, and October 16, 1929, the Commissioner replied reviewing the past history of the transaction, quoting from his letter to plaintiff of June 23, 1927, and concluding his letter as follows:

> The amount paid in May 1927 was listed on the Collector's unidentified collections account in accordance with the usual procedure and no further entries have been made with respect to this payment.
>
> It appears that the status of the case has not changed since the letter above-quoted was written, and this office contemplates no further action until the appeal now pending before the Board has been decided.

19. On March 14, 1930, the parties to the proceeding described in finding 12 herein, through their respective counsel, entered into a stipulation which was filed with the Board of Tax Appeals on the same date. The said stipulation stated as follows:

> It is hereby stipulated and agreed by and between the parties to the above-entitled proceeding, through their respective counsel of record, that there is a deficiency in tax for the calendar year 1920 in the amount of $100,442.20 against this petitioner, which has been

assessed subsequent to the filing of the petition herein and that there is, therefore, no additional deficiency in tax to be assessed against this petitioner.

An order may be entered by the United States Board of Tax Appeals in accordance with this stipulation.

On March 22, 1930, pursuant to the said stipulation, the Board of Tax Appeals entered an order which stated that "* * * there is now no deficiency in tax with respect to this petitioner for the year 1920."

20. Subsequent to the entry of the aforesaid order of the Board of Tax Appeals, the Commissioner of Internal Revenue, in a communication dated October 20, 1930, instructed the collector to cancel the certificate of overassessment purporting to abate the assessment of $107,753.84, to reverse the abatement of the same amount and to transfer the payment of $100,442.20 made on May 13, 1927, from the suspense account to the assessment on the October 1927 list, left open by the reversal of the abatement. The collector was further instructed in said communication to treat the overpayments for 1918 and 1919 totalling $81,836.55 as credits made to the 1920 deficiency in tax and to reduce the interest of $7,311.64 previously assessed by that proportionate part of the amount of $7,311.64 which the overassessments totalling $81,836.55 bore to the deficiency for 1920 of $100,442.20. Accordingly, the collector reinstated the assessment of $100,442.20 plus an amount of $1,354.39 as interest due on the 1920 deficiency. Thereafter the collector mailed to the plaintiff a notice and demand dated October 23, 1930, for the payment of interest on the 1920 deficiency computed at $1,354.39. This amount of $1,354.39 was paid by the plaintiff under protest on November 3, 1930.

November 20, 1930, plaintiff requested further information relative to the payment of $100,442.20 for 1920, and November 21, 1930, the collector replied, stating in part as follows:

> My records show that under date of May 13, 1927, payment was made to this office by you in the amount of $100,442.20 for the purpose of applying same against an impending additional tax for the year 1920 of a like amount. The amount was placed in my unidentified account pending the receipt of the assessment of the

> tax in question. It also appears that you received overassessments for the years 1918 and 1919 in the amount of $81,836.55, which amount was refunded to you as a result of the payment of the above mentioned impending additional tax for year 1920. It also appears that you filed an appeal to the Board of Tax Appeals with respect to such additional tax for the year 1920, and the question of interest adjustment for the years 1918, 1919, and 1920 was held in abeyance pending disposition of such case before the Board. I was subsequently advised by the Commissioner's office that a stipulation had been entered into to the effect that there was a deficiency in tax due of $100,442.20 for the year 1920 or a net amount due for the years 1918, 1919, and 1920 of $18,605.65.
>
> In conformity with this stipulation and in accordance with instructions received from the Commissioner's office, I applied the overassessments for the years 1918 and 1919 already refunded to you to the 1920 deficiency in order that the account in my office might be closed out.

The difference between the interest assessment on the deficiency for 1920 in the amount of $7,311.64 and the November 3, 1930, payment of $1,354.39, namely $5,957.25, was abated on the basis of the adjustments made in the accounts for the years 1918, 1919, and 1920.

21. March 11, 1931, plaintiff made application for additional interest on the overpayments for 1918 and 1919, stating as a reason therefor that interest should be allowed on the overpayments for 1918 and 1919 by virtue of section 1116 (a) of the revenue act of 1926, and that such interest should be computed at 6 per cent from the date of the payment of the amounts refunded to the date of the allowance of the refunds.

April 2, 1931, the Commissioner denied such application.

April 20, 1931, plaintiff requested consideration by the General Counsel of the Bureau of Internal Revenue of its application for additional interest, and September 5, 1931, plaintiff's representative was advised of the result of the General Counsel's consideration in part as follows:

> You are advised that under section 1116 (a) of the Revenue Act of 1926 no interest is payable on overpayments credited to a deficiency in tax imposed for 1920, or prior taxable years, for the period during which

such deficiency was owing to the Government. Prior to the voluntary payment above referred to, there was no refund due the taxpayer within the meaning of the statute by reason of the overpayments made for the taxable years 1918 and 1919, nor was any interest payable on the said overpayments which were required to be credited to the deficiency in tax determined to be due for the taxable year 1920. The voluntary payment, while preventing adjustment of the taxpayer's accounts as provided in the statute, and as set forth in the notice given to the taxpayer, resulted in the refund subsequently made and interest will, therefore, be allowed accordingly; that is, from the date of the voluntary payment to the date of the allowance of the refund.

22. By letter dated September 25, 1931, the Commissioner of Internal Revenue advised the collector of an error in the interest computation on the 1920 deficiency resulting from a failure to consider the overpayment of interest for 1918, as set out in finding 14 herein, in the amount of $12,359.66. The interest on the deficiency had been computed on the basis of overpayments for 1918 and 1919 in the amount of $81,836.55 instead of $94,196.21. The collector was directed to prepare the appropriate form to show an interest adjustment on the basis of the difference between the interest paid on November 3, 1930, in the amount of $1,354.39, and an adjusted amount of $454.67 "Notice of refund" (form 844) for the difference in the amount of $899.72 was transmitted to the Commissioner of Internal Revenue by the collector on October 5, 1931.

23. A schedule of overassessments on form 7920, designated Supplemental Schedule IT: 25920, was signed by the Commissioner of Internal Revenue on October 22, 1931. In this were listed interest allowances on the amounts of overpayments for the years 1918 and 1919 in the amounts of $568.51 and $10.85, respectively, which were shown as having been allowed on a schedule of identical number dated June 20, 1927, and allowance on account of the error in the interest computation on the 1920 deficiency in the amount of $899.72, plus additional interest thereon in the amount of $52.29. The total of said certificate was $1,531.37. On November 4, 1931, a check for the full amount shown thereon,

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together with notices of interest allowances for 1918 and 1919, and notice of refund for 1920, was mailed to the plaintiff. The notices of interest allowances showed that the 1918 and 1919 overpayments aggregating $94,196.21 had been refunded.

24. The interest refunds and allowances were computed as follows:

Amount of overpayment	Interest allowed		Interest
	From—	To—	
1918			
$80,072.44	May 13, 1927	June 20, 1927	$492.48
12,359.66	May 13, 1927	June 20, 1927	76.03
92,432.10			568.51
1919			
1,764.11	May 13, 1927	June 20, 1927	10.85
1920			
899.72	November 3, 1930	October 22, 1931	52.29

No other interest allowances have been made by the Commissioner of Internal Revenue with respect to the overpayments as determined for the years 1918 and 1919. No other action was taken by plaintiff until November 15, 1932, when this suit was instituted.

25. The computation of interest by the Commissioner on account of overpayments in favor of plaintiff for 1918 and 1919 and the deficiency for 1920 was consistent with the advice furnished plaintiff from at least May 24, 1927, and the scheduling of the overpayments for 1918 and 1919 on June 20, 1927, was done by the Commissioner upon the express statement to plaintiff that interest thereon would not be adjusted until after a final determination by the Board of the deficiency for 1920.

The court decided that plaintiff was not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

The plaintiff brings this suit for interest on alleged overpayments of income taxes for the year 1918 and 1919 which

it claims were refunded to it. The controversy arises in the following manner:

Prior to and during 1927, the Commissioner of Internal Revenue had under consideration the returns of the plaintiff for the years 1918, 1919, and 1920, and, as a result of his audits, he determined an overassessment for 1918 of $80,072.44, an overassessment for 1919 of $1,764.11, and a deficiency for the year 1920 of $100,442.20. On January 13, 1927, a thirty-day determination letter was sent to the plaintiff showing the above overassessments and deficiency and notifying plaintiff that the overassessments would be credited to the deficiency in accordance with Section 284 (a) of the Revenue Act of 1926. On March 16, 1927, a sixty-day letter was sent to the plaintiff advising it of the proposed overassessments and deficiency and notifying it of its right of appeal to the United States Board of Tax Appeals so far as the deficiency was concerned. On May 13, 1927, prior to the expiration of the sixty days, plaintiff voluntarily delivered to the collector its check for $100,442.20, the exact amount of the proposed deficiency for 1920, and indicated on the check that payment was being made under protest. At that time the deficiency had not been assessed and therefore the collector, in accordance with the usual procedure, entered this amount in his suspense account awaiting instructions of the Commissioner. The following day the plaintiff filed its petition with the Board of Tax Appeals, asking for a redetermination of the proposed deficiency. On May 24, 1927, at a conference with a deputy commissioner of Internal Revenue, plaintiff requested that the overassessments for 1918 and 1919 be scheduled, and, if found to be overpayments, that they be refunded in full, with interest, since a check for the full amount of the proposed deficiency for 1920 had been deposited with the collector. The Commissioner refused to accede to plaintiff's request for the reason that the deficiency for 1920 was before the Board of Tax Appeals for determination and, when finally determined, he intended to apply the overassessments for 1918 and 1919 as a credit against the deficiency for 1920 and make payment to the plaintiff of the net balance due (if any) with the appro-

Opinion of the Court

priate adjustment of interest. When the Commissioner was notified by the collector that the taxpayer had voluntarily paid the full amount of the proposed deficiency, the Commissioner instructed the collector to hold this amount as a cash bond for the reason that the plaintiff had taken an appeal to the Board of Tax Appeals for a redetermination. The Commisssioner also notified the taxpayer that this amount, voluntarily paid in to the collector, would be treated as a cash bond awaiting the decision of the Board of Tax Appeals on the amount of the deficiency for the year in question. However, having in his possession funds in the amount of the overassessments for 1918 and 1919, amounting to some eighty odd thousand dollars and a check deposited by the plaintiff equal to the proposed deficiency in the sum of $100,442.20, the Commissioner in effect advised plaintiff that he would, as a concession and as a special favor to the plaintiff, return to it a sum equal to the two overassessments, and, as there was no other method of paying this sum to plaintiff, he consented to schedule these overassessments and pay them to the plaintiff in the form of a refund. Accordingly, on July 18, 1927, the collector prepared, signed, and returned the schedule of overassessments and sent the same to the Commissioner. The Commissioner completed the schedules and the plaintiff was paid the amount without any computation of interest. The certificates of overassessments, which were completed at about the same time, likewise were for the amount of the overassessments without any allowance of interest. After the plaintiff had been paid these amounts, the parties to the proceeding before the Board of Tax Appeals stipulated that the deficiency for 1920, as determined by the Commissioner, was correct and an order was taken dismissing the appeal. The Commissioner then proceeded with the final adjustment of plaintiff's accounts for the three years in question by treating the overpayments for 1918 and 1919 as credits against the deficiency for 1920, as provided for under Section 284 (a) of the Revenue Act of 1926, and determined interest accordingly. In this manner the accounts for these years were finally closed.

The plaintiff's contention is that the Commissioner having scheduled the overassessments as overpayments and refunded to it these amounts, under Section 1116 (a) of the Revenue Act of 1926, interest should have been computed from the dates of payment to the date of the refunds. This court and other courts have had many similar situations and the courts have consistently sustained the action of the Commissioner. *York Safe & Lock Company* v. *United States*, 69 C. Cls. 529; *Standard Oil Company (Indiana)* v. *United States*, 78 C. Cls. 714; *Eastman Kodak Company* v. *United States*, No. M–81, decided by this court February 3, 1936, (82 C. Cls. 504) certiorari denied October 19, 1936; *McCarl* v. *Leland*, 42 Fed. (2d) 346; *Tull & Gibbs* v. *United States*, 48 Fed. (2d) 148; *United States ex rel. Cole* v. *Helvering*, 73 Fed. (2d) 852; *and United States* v. *Pacific Midway Oil Company*, decided by the District Court for the Northern District of California and affirmed, 66 Fed. (2d) 1017. The plaintiff recognizes the force of these decisions as opposed to recovery but contends that certain acts of the Commissioner take this case out of the general rule and permit recovery of interest. It contends that this case falls within the rule laid down by this court in the case of *Libby, McNeill & Libby* v. *United States*, 80 C. Cls. 579, which is an exception to the general rule.

In the *Libby case, supra*, the Commissioner found an overpayment for 1917 and applied a part of it at the taxpayer's request to an installment of the original tax for 1928. The balance of the overpayment was certified as refundable. At the time this determination was made there was pending before the Board of Tax Appeals a deficiency for 1919, which apparently had been determined entirely separate and apart from the overpayment for 1917. The balance of the overpayment for 1917 was withheld from refund to the taxpayer pending disposition of the appeal to the Board for 1919. When the appeal for 1919 was finally determined, showing a deficiency for that year, the Commissioner assessed the deficiency and made demand for payment, which the taxpayer complied with. Later, when the taxpayer demanded the refund of the balance of the overpayment for 1917, the Commissioner sought to change

his records and have the overpayment applied as a credit against the deficiency for 1919 which had already been satisfied. This court held that, since the deficiency had already been satisfied after assessment and demand for its payment by the Commissioner, there was nothing against which the overpayment could be applied.

In the instant case, the plaintiff voluntarily attempted to make payment of the deficiency which had not been assessed, and, when the matter was brought to the attention of the Commissioner, he treated this payment as a cash bond for the reason that overassessments had been determined for the prior years and the plaintiff had taken an appeal to the Board of Tax Appeals for a redetermination of the proposed deficiency. When the plaintiff requested the scheduling of these overassessments and the payment of them in full with interest, the Commissioner refused, but, as a concession, agreed to return a part of the money which he held in his hands for the payment of this deficiency when the amount of it should be found by the Board of Tax Appeals, however, on the clear condition that these overassessments would be kept open and applied as credits to whatever amount was found by the Board to be the correct amount of the deficiency, and, when this credit was made, the interest would be computed. Plaintiff was not only advised by letter that the overpayments were not being scheduled in the usual manner as a closed and completed transaction, but also the acts of the Commissioner were consistent with such provisional action, the letter advising that the overpayments would be scheduled without interest, the schedule of overassessments being completed without the usual interest computation, and the certificate of overassessment, of which plaintiff received a copy, likewise omitting the usual interest notation. Under such circumstances it would be groundless to say that plaintiff was not clearly advised that the Commissioner was not making final disposition of the overpayments at this time but was leaving them open for final adjustments when the deficiency was finally determined. It is, therefore, clear that the plaintiff accepted the payment of these amounts with the full knowledge that the Commissioner intended to carry out the provisions of Section 284

(a) of the Revenue Act of 1926 which permitted him, where there were overassessments and a deficiency, to credit the overassessments to the deficiency before computing interest. The Commissioner was aware that the plaintiff was apparently endeavoring to pay the 1920 proposed deficiency so as to stop interest on this amount and to collect interest on the overassessments for the years 1918 and 1919 for some greater number of years. The Commissioner was consistent from the beginning to the end of this transaction in keeping the record clear so that, in making these payments to the plaintiff, the provisions of Section 284 (a) would not be impaired in any way and that he would be free to apply the overpayments as a credit to the deficiency as soon as the appeal taken to the Board of Tax Appeals was determined.

It will be seen that this case differs entirely in its facts and the actions of the Commissioner in reference to the deficiency from the facts presented in the *Libby case*. There was no demand for payment made by the Commissioner or an application of the payment to the deficiency. On the contrary, the deficiency had not been assessed when the plaintiff voluntarily made the payment of a like amount to the collector. However, the plaintiff contends that refunds were made to it and that, where refunds or credits are made, section 1116 (a) requires that interest shall be computed from the date of the payment to the date of the refund on all overpayments. Technically speaking, refunds were made to the plaintiff but they were not real refunds in the technical sense. What the Commissioner did was to allow the plaintiff a sum equal to the overpayments out of the large amount in his possession in the form of refunds but, in substance, partial or advance payments only. The plaintiff knew when these amounts were paid that the Commissioner had refused to compute interest; that he had consistently stated that the overassessments when scheduled as overpayments would be applied to the deficiency when it was finally determined and that interest then would be computed.

In our opinion, the concession made to the plaintiff of the repayment of part of this large amount held by the Commissioner should not be a penalty upon him for the favor

granted to the taxpayer. He could have retained the entire amount until the decision of the Board of Tax Appeals had been rendered, during which period the plaintiff would have been out of the use of the large amount of money which, as a special favor, the Commissioner returned to him.

In our judgment this case falls within the general rule, as shown by the cases above cited, and not within the exception. The plaintiff is not entitled to recover and its petition is therefore dismissed. It is so ordered.

WILLIAMS, *Judge*, and BOOTH, *Chief Justice*, concur. LITTLETON, *Judge*, concurs in view of former decisions.

GREEN, *Judge*, concurring:

If the Commissioner had adhered to his original determination with reference to the payment by plaintiff and the application of the overassessments, he would have been on safe ground. But, realizing that a large amount of money would eventually have to be returned he refunded the amount of the overassessments without interest, having previously and continuously given the plaintiff clearly to understand that interest would not be allowed as demanded. It is urged by plaintiff that the law expressly required the payment of interest on refunds, but I do not think this prevented the Commissioner from making a conditional payment especially under the circumstances of the case. In *York Safe & Lock Co.* v. *United States*, 69 C. Cls. 529, 538, we held that section 284 (a) of the revenue act of 1926 was mandatory that an overpayment should be credited against any tax due. In *Standard Oil Co. of Indiana* v. *United States*, 78 C. Cls. 714, we discussed this matter further and held that the statute required the Commissioner to credit overpayments on deficiencies then existing. In *Eastman Kodak Co.* v. *United States*, 82 C. Cls. 504, we reaffirmed this rule. In the case at bar, the Commissioner had determined that overpayments had been made and that there was a deficiency. He therefore had no right or authority to refund any part of the overpayment that should under the law have been applied on the deficiency. When the Com-

missioner made the final settlement and adjustment of plaintiff's account for the three years involved, he complied with the law by applying the overpayments for 1918 and 1919 in payment of the deficiency of 1920 and computed the interest accordingly. The law did not require that interest should be allowed on a refund illegally paid, and his final determination was correct.

I am authorized to state that WILLIAMS, *Judge*, and BOOTH, *Chief Justice*, concur in the views above expressed.

W. W. ANDERSON v. THE UNITED STATES

[No. 42279. Decided December 7, 1936. Findings of fact amended, and new judgment, June 1, 1937]

On the Proofs

Subsistence allowances, Veterans' Bureau; per diem in lieu of subsistence.—The plaintiff, a field examiner in the United States Veterans' Bureau, with official post of duty at Louisville, Kentucky, was entitled to subsistence allowances while absent from Louisville on official business in Lexington, Kentucky, notwithstanding his home was in Lexington.

The Reporter's statement of the case:

Mr. Samuel T. Ansell for the plaintiff.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

Plaintiff sues to recover $611.50, per diem allowances in lieu of subsistence while on official business and absent from his designated official post of duty at Louisville, Kentucky, under his appointment as a field examiner of the Veterans' Bureau during the period January 20, 1931, to May 21, 1932. During a portion of the period involved, plaintiff was regularly paid his per diem allowances in lieu of subsistence, here in question, while absent from his designated post of duty in the total sum of $225.30 until the Comptroller General held that plaintiff was not entitled to any per diem allowance while engaged on official business at Lexington,

Ky., which was his home. During the period in question and at all times his official post of duty was designated as Louisville, Ky., at which place the offices and headquarters of the District Office of the Veterans' Bureau were located.

The Comptroller General refused to permit plaintiff to be paid any further per diem allowance or subsistence while absent from his designated post of duty in Louisville, Ky., when on official business as a field examiner at Lexington, Ky., and deducted from his subsequent pay the amount of $225.30 theretofore paid to him by the Veterans' Bureau.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

Plaintiff, a citizen and a resident of the State of Kentucky, was duly appointed field examiner in the Veterans' Bureau effective January 20, 1931, with official station at Louisville, Kentucky. He entered on duty under said appointment on the same date. His official mail and orders were addressed by the Veterans' Bureau to him at Louisville which was recognized by the officials of the Veterans' Bureau as his official station during the entire period in controversy, to-wit: from January 20, 1931, to May 21, 1932.

The payment of a per diem of $6 in lieu of subsistence to field examiners while in a duty status and absent from their official stations was authorized by the Veterans' Bureau in accordance with law and travel regulations made pursuant to law. November 16, 1931, the per diem rate was changed from $6 to $5. Plaintiff was authorized to receive and was allowed such fixed per diem rate at every place while on official business and absent from his official station at Louisville, except while at Lexington, Kentucky.

Plaintiff was frequently ordered by the Veterans' Bureau or Veterans' Administration to travel from Louisville to Lexington; and while at Lexington on official business, and absent from his official station at Louisville during the period from January 20, 1931, to May 21, 1932, he was paid a partial per diem amounting to $225.30. Later the Comptroller General held that plaintiff was not entitled to any per diem allowance while at Lexington and directed that the amount of $225.30 be refunded by him to the Gov-

ernment; and, accordingly, the amount of $225.30 was recovered by the Government by monthly reductions from plaintiff's official salary prior to May 21, 1932. Plaintiff, therefore, was not allowed nor was he paid anything on account of such fixed per diems while at Lexington in the performance of official duties during the period from January 20, 1931, to May 21, 1932, although vouchers for such per diems on account of such services were submitted to the General Accounting Office for payment.

The amount due plaintiff for per diem allowances in lieu of subsistence while on official business at Lexington and absent from his official station at Louisville during the period from January 20, 1931, to May 21, 1932, is $345.85.

Plaintiff has received no per diem allowances while on official business at Louisville for the reason that said place had been designated as, was, and still is, plaintiff's official station.

If it should be held that during the period from January 20, 1931, to May 21, 1932, plaintiff's official station was Lexington instead of Louisville, and it be further held that during that period he is entitled to per diem allowances in lieu of subsistence while on official business at Louisville, there would be due him the sum of $692.85.

The court decided that plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

We think it is clear from the facts in this case and on the authority of the opinion of this court in *Simonstad* v. *United States*, 71 C. Cls. 436, that plaintiff is entitled to recover the amount of $611.50, the authorized per diem allowance in lieu of subsistence while he was absent from his official post of duty on official business of the United States.

Louisville, Kentucky, was the headquarters and principal district office of the U. S. Veterans' Bureau, duly established by proper authority. Plaintiff was duly appointed and assigned to that office as a field examiner and that station was officially, and by proper authority, designated as his official post of duty. When he was appointed and during the period involved in this case his home was at Lexington, Ky.,

where he was ordered from time to time to perform official duties in the position which he held with the Bureau. He was directed to perform, and did perform, similar duties at other places. Only the statutory per diem allowance in lieu of subsistence while engaged on official business in Lexington, while away from his post of duty at Louisville, is in controversy here.

The Comptroller General held that the headquarters or official post of duty of plaintiff was at Lexington because that was his home and that, therefore, he was not entitled to any per diem allowance or subsistence while engaged on official business at that point, but under the facts in this case that conclusion of the Comptroller General cannot stand. Plaintiff's official station was fixed at Louisville by the proper official of the Veterans' Bureau because that was the headquarters and principal office of the Veterans' Bureau in that territory. The decision of the Comptroller General assumes that the authorized official of the Veterans' Bureau fixed plaintiff's post of duty at Louisville merely for the purpose of entitling him to subsistence at Government expense when absent from that post on official business at Lexington, Ky. There is nothing in the record to support this assumption. Moreover, if, as the Comptroller General ruled, plaintiff's headquarters or official post of duty was at Lexington, Ky., the plaintiff would be entitled under the pertinent statute to receive $692.85 while absent from such post of duty on official business. But we are clear upon the facts in this case that the decision of the Comptroller General was wrong and that plaintiff should be paid the amount of $345.85 claimed. In *Simonstad* v. *United States*, *supra*, the defendant contended that the plaintiff in that case was not entitled to recover for the reason that the act of May 10, 1916, which authorized the payment of subsistence while an employee was absent from his post of duty on official business, did not confer the right on officials of the Government to fix an employee's headquarters, where no duties were required to be performed, merely for the purpose of entitling the employee to subsistence at Government expense while on duty at his actual station. But the court said, "This argument assumes that the Commissioner of Internal Revenue

fixed the plaintiff's post of duty at Washington, D. C., merely for the purpose of entitling the plaintiff to subsistence at Government expense. There is nothing in the record to support this assumption. The fact that the plaintiff performed no services at his designated post of duty during the period here involved, and that the work assigned to him kept him during the whole of that period at another place, does not justify the assumption or the inference that his designated post of duty was fixed by the Commissioner for the mere purpose of entitling him to subsistence at Government expense. The plaintiff was a field worker, as distinguished from a departmental employee, and would by the very nature of his employment be absent from his designated post of duty a greater part or all of the time. This was undoubtedly taken into consideration by the Commissioner when he designated plaintiff's post of duty. Had the plaintiff during the period here involved been changed from one place to another, performing in the meantime no services at his designated post of duty, it would hardly be contended he would not be entitled to receive subsistence compensation. We fail to see what difference it can make, so far as his right to subsistence allowance is concerned, whether the whole time he was away from his designated post of duty was spent at one place or at a dozen different places."

Judgment will be entered in favor of plaintiff for $345.85. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

GEORGIA WHOLESALE CO. v. THE UNITED STATES

[No. 42604. Decided December 7, 1936]

On the Proofs

Sale of surplus Government property; breach of contract by the Government; measure of damage.—Where the Government contracted for sale to the plaintiff of all surplus unused trench shoes belonging to it, delivery and payment to be made over a

Syllabus

period of five years, and the Government subsequently, during such period, withdrew and made other disposition of a large quantity of such shoes, it constituted a breach of the contract by the Government which entitled the plaintiff to terminate the contract and to recover for the damage sustained by it as a result of the breach and termination of the contract, the measure of such damage being the difference between the contract price and the fair and reasonable market value of the shoes remaining undelivered at the time of the termination of the contract.

Same.—Where one party to a contract prevents its performance, or puts it out of his own power to perform in accordance with its terms, the other party may regard the contract as terminated and demand whatever damage he has sustained by reason of its termination.

Divisibility of contract.—Where the entire quantity of surplus unused Government trench shoes was offered and sold to the plaintiff as a whole, the contract of sale was not divisible because of the contract price being fixed at a certain price per pair for the shoes; the fixing of a price per unit for the ascertainment of compensation as a whole does not render a contract severable.

Suit for breach of contract; claim for extraneous compromise payment.—In a suit against the Government for damage for breach of contract, there can be no recovery by the plaintiff, as an item of such damage, of money paid the Government in connection with the execution of the contract in suit, but in compromise and settlement of claims and counterclaims under a prior contract with the Government, and which payment had no connection with the performance or nonperformance of the contract in suit.

Recovery by plaintiff of expense of resales organization.—Where a contract for sale by the Government to the plaintiff of certain surplus property being acquired by plaintiff for resale was terminated as a result of a breach by the Government, there can be no recovery by plaintiff on account of expenses incurred by it in carrying on its business of reselling such property unless it be shown that some portion of such expenses was incurred in respect of and was directly related to the portion of the contract remaining unperformed at the time of the breach and termination of the contract.

Adjustments by Secretary of War in sales of surplus property.—Where the Secretary of War was authorized by the statutes to sell surplus supplies under his control upon such terms as might be deemed best, he had authority, whether acting by himself or by others duly authorized and acting under and for him, to make such adjustments in sales of such supplies as were justified in the interest of fair dealing.

The Reporter's statement of the case:

Mr. Carl N. Davie and *Mr. Royal C. Johnson* for the plaintiff. *Messrs. J. Frank Kemp, A. O. Randall, Harvey J. Kennedy, Clint W. Hager*, and *Frank T. Davie* were on the brief.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Henry Fischer* was on the brief.

Plaintiff sues to recover $1,019,594.45 for alleged breach of a written contract of July 24, 1930, under which plaintiff purchased and agreed to furnish shipping instructions for and the defendant agreed to deliver 1,107,634 pairs, more or less, of surplus unused trench shoes, being all the surplus shoes the defendant had on hand. These shoes, as both parties well knew, were of various sizes and widths, and had been described in detail in circular proposal 7–E issued by the surplus property division of the office of the Quartermaster General of the U. S. Army, May 31, 1923. This contract fixed the price of the entire quantity of the surplus unused Army trench shoes then on hand in Government storage at $1.55 a pair. The contract gave plaintiff five years from the date thereof, or until July 24, 1935, within which to furnish shipping instructions and take delivery of the entire quantity of shoes covered thereby.

Between April 5 and September 11, 1933, the defendant took from the quantity of shoes which had been sold to plaintiff 223,897 pairs from various points of storage for its own use and shipped them to various points for use by the U. S. Civilian Conservation Corps. Plaintiff contends that in doing this the defendant breached the contract and rendered itself incapable of complete performance thereof; that the 223,897 pairs of shoes taken from the quantity of 1,094,037 pairs undelivered at the time, consisting of the popular or medium sizes and widths, destroyed the existing size range of the entire stock and robbed same of the popular sizes, thereby impairing and practically destroying the market value of the shoes remaining. For this alleged breach plaintiff claims $929,931.45 as the difference between

the contract price of $1.55 a pair for 1,094,037 pairs of shoes and the alleged market price of $2.32 a pair at the time of the breach. In addition, plaintiff seeks to recover $25,000 paid by it to the defendant in consideration of the execution of this contract in lieu of an original contract executed June 16, 1923, for a total of 2,664,902 pairs of shoes; and also the further sum of $64,663, representing plaintiff's outlay for expenses in the performance of the contract, the alleged breach of which is the basis of this suit.

The defendant contends that plaintiff cannot recover for the reasons that (1) it neither fully performed nor offered to perform the contract on its part and did not call upon the defendant for full performance; the defendant neither repudiated the contract nor refused further performance on its part; (2) the contract sued upon is divisible, which precludes plaintiff from claiming damages until after the time of full performance by both parties has expired, upon the happening of which event plaintiff must allege and prove that it had furnished shipping instructions for all the shoes agreed to be sold, accompanied by a tender of payment therefor; (3) plaintiff breached the contract by failing to furnish shipping instructions for the delivery of all the shoes covered by the contract which the defendant alleges was a condition precedent to further performance by it; (4) the appropriation by the defendant for its own use of 223,897 pairs of shoes sold the plaintiff, for which plaintiff had not furnished shipping instructions, did not constitute a breach of the contract entitling plaintiff to sue for damages; (5) if the appropriation by the defendant for its own use of a portion of the shoes which had been sold plaintiff constituted a breach of the contract, it was the duty of plaintiff to minimize any damages it might or could sustain by furnishing shipping instructions for delivery of all the shoes covered by the contract within the time specified therein accompanied with a tender of payment therefor; and (6) in any event plaintiff cannot recover because the market price of the shoes at the time of the alleged breach in 1933 was much less than the contract price, and that such market price was not more than thirty-five cents a pair.

The defendant has filed three counterclaims. The first is for $226,453.47, balance alleged to be due on a quantity of surplus meats sold to plaintiff in 1921. The second is for $118,710.09, balance alleged to be due for certain articles of surplus property consisting of underwear, shoes, leggings, saddles, etc., sold to plaintiff in 1921 and 1922. And the third is for $1,134,775, alleged to be due by plaintiff under the contract for surplus trench shoes involved in this case as the difference between the contract price of $1.55 a pair and the market price of the 1,094,037 pairs of shoes remaining in Government storage for which the plaintiff did not furnish shipping instructions within the period of five years allowed by the contract.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a Georgia corporation with principal office at Macon. A contract of July 24, 1930, alleged to have been breached by the defendant in 1933, is the contract involved in this suit, but for a better understanding of the case certain facts with reference to prior contracts relating to the same subject matter should be stated.

In 1923 the defendant had on hand approximately 2,664,902 pairs of unused trench shoes which had been declared surplus property and on May 31, 1923, issued circular proposal 7–E for the sale of these shoes. This circular set forth in detail the approximate number of pairs of shoes of various sizes and widths making up the entire quantity and the various places at which they were stored, as well as the number of pairs of shoes and the sizes of each lot on hand at each point of storage.

On June 16, 1923, a written contract was entered into by which defendant sold plaintiff 2,606,300 pairs of these shoes, which amount was later increased to 2,664,902 pairs at $1.57⅝ a pair. Plaintiff agreed to accept and pay for the quantity of surplus shoes on hand in Government storage as specified in circular 7–E in accordance with the terms of the circular and the contract entered into pursuant thereto. The period of performance of this contract was eighteen months from the date thereof, and it provided that plaintiff take and

pay for a specified number of pairs of shoes every two months at the price specified. Before arrival of the date for complete performance of this contract plaintiff found that due to certain circumstances not material here it would be unable to maintain the 60-day schedule of deliveries, and, after negotiations with the defendant, a supplemental contract was entered into February 29, 1924, under which the sixty-day delivery requirement was eliminated and the price of the shoes was increased by 1⅜ cents a pair, making the purchase price $1.59 a pair instead of $1.57⅝ as originally specified. The termination date of December 16, 1924, of the original contract remained unchanged, but a provision was inserted in this first supplemental contract for an additional six months' extension to June 16, 1925, if necessary, and for that extension the price of the shoes was increased one cent a pair, making the total purchase price of the shoes $1.60 a pair for all the shoes for which shipping instructions had not been furnished on or before December 16, 1924.

Later, August 6, 1926, a second supplemental contract modifying the original and first supplemental contracts was entered into which provided for delivery of the entire quantity of shoes within four years, or August 6, 1930. Under this contract the price of the shoes then undelivered was increased by 4% per annum on the price of $1.60 a pair from August 6, 1926, to the date of the actual shipment of each lot of shoes. For all shoes delivered subsequent to August 6, 1926, the Government, under the terms of those contracts, received 1.85\frac{6}{10}$ a pair.

2. Plaintiff at all times proceeded diligently with the performance of these contracts and complied with the provisions thereof, as well as with the provisions in circular proposal 7–E which had been made a part of the original contract. It delivered to the defendant unconditional and irrevocable letters of credit for $411,000 to cover the deposit of 10% under the original contract of June 16, 1923. Later, in 1925, some controversy arose between the bank which issued these letters of credit and the Government, as a result of which the Government refused for several months to make shipments of shoes on plaintiff's order which, together with other conditions over which plaintiff had no control,

had the effect of disrupting plaintiff's selling organization and disconcerting its financial connections and marketing outlets. This controversy concerning the letters of credit was terminated when the second supplemental contract was executed August 6, 1926, by the payment by plaintiff to the defendant of approximately $196,000 in cash, and additional letters of credit were furnished to apply on future shipments. Thereafter plaintiff proceeded in the performance of the original contract as supplemented in accordance with the terms thereof, and was at no time in default. However, in 1930, market conditions and the demand for these shoes were materially affected by the depression. Believing that it would be difficult, if not impossible, to dispose of approximately 1,107,634 pairs of shoes then on hand and covered by the original contract, as amended, at the prices provided therein, negotiations were begun between plaintiff and the defendant for some modification of the original contracts by reason of the changed conditions. At that time plaintiff had furnished the defendant shipping instructions and had paid for a total of 1,557,268 pairs of shoes at the prices hereinbefore mentioned. This left on hand approximately 1,107,634 pairs of shoes which plaintiff had not sold and for which it had not furnished shipping instructions to defendant. The original contract of June 16, 1923, contained no default clause, but this contract as modified by the second supplemental contract provided that any shoes remaining on hand on August 6, 1930, the expiration date of the contract, might be sold by defendant at public auction for the account of the purchaser and that the contractor would be held liable for any deficiency.

At the time of these negotiations in 1930, and at all times subsequent thereto, the only business of plaintiff was the sale of the trench shoes purchased from defendant, and, while plaintiff had good credit and adequate financial backing, the corporation had practically no other assets.

Plaintiff proposed to the defendant that by reason of the changed trade conditions in the country and because, as was believed, the market would not absorb at the prices specified the 1,107,634 pairs of shoes remaining on hand within the few months remaining for the performance of the original

contract, the time for completion be extended four years from the date of a new contract, and that plaintiff take and pay for the shoes then remaining undelivered at $1.57⅝ a pair, the price provided in the original contract of June 16, 1923, before it was supplemented February 1924 and August 1926; that plaintiff would furnish an additional letter of credit for $100,000 upon the execution of such contract against which drafts might be drawn in payment for shoes as shipped. Upon consideration of plaintiff's proposal the War Department concluded that in the event the original contract as modified by the first and second supplemental contracts should not be completely performed by the date therein specified, namely, August 6, 1930, a forced sale at public auction of approximately 1,107,634 pairs of shoes, for which shipping instructions had not been furnished at the time of the negotiations early in April 1926, would probably not produce at that time a price in excess of $1.25 a pair, and that by reason of all the circumstances existing at that time it would be to the advantage of both parties to modify the existing contracts. The negotiations finally resulted in the execution of a new contract on July 24, 1930. This contract provided in part as follows:

> Whereas under date of June 16, 1923, the contractor entered into a contract with the Government (hereafter referred to as the original contract) governing the purchase by it from the Government of 2,606,300 pairs of surplus unused trench shoes, which original contract was modified in certain material particulars by supplemental agreement bearing date February 29, 1924 (hereafter referred to as the first supplemental contract), and under date of August 6, 1926, such original contract as thus modified by such first supplemental contract was modified in certain material particulars by a second supplemental agreement (hereafter referred to as the second supplemental contract), in alleged default of the terms of which original contract so modified there are approximately 1,107,634 pairs of shoes yet undelivered and in the hands of the Government; and
>
> Whereas the contractor has proposed in compromise and as full settlement of all claims and counterclaims between the Government and the contractor, of every character arising out of such original contract as modi-

fied by such first and second supplemental contracts, that, viz:

It will pay to the Government the sum of twenty-five thousand ($25,000) dollars cash in hand and enter into a contract with the Government prescribing the terms and conditions, contemporaneously agreed to, governing the disposition, at the price of one and fifty-five hundredths dollars ($1.55) per pair, of approximately 1,107,634 pairs of such shoes yet undelivered in accordance with the provisions of the original contract as modified by the first and second supplemental contracts; * * *

Now, therefore, in consideration of the premises and the mutual benefits to accrue to the parties hereto from such compromise and settlement, complementing which this contract is being entered into, and the further mutual benefits to accrue to the parties hereto under the provisions hereof; the contractor being released contemporaneously with the execution of this contract, in accordance with its proposal for settlement accepted by the Secretary of the Treasury, as appears from a certificate from his office and also from the letter from the office of the Solicitor of the Treasury to the Secretary of War, both of even date herewith, advising him of such acceptance by the Secretary of the Treasury;

It is hereby mutually agreed between the parties hereto as follows: The Government agrees to sell and the contractor agrees to buy the entire quantity of surplus unused Army trench shoes now remaining on hand in Government storage, approximately 1,107,634 pairs, for the sum of one and fifty-five hundredths dollars ($1.55) per pair.

This contract further provided in Art. VIII that plaintiff would furnish shipping instructions for and take delivery of the entire quantity of shoes covered by the contract within five years from the date thereof, or July 24, 1935. Art. XIII provided that in the event of failure of the plaintiff so to do the Government should have the right to declare it in default as to the undelivered portion of the shoes and to declare all amounts due under the contract as immediately due and payable, or to declare the plaintiff in default and proceed to sell the undelivered portion of the property for the account of plaintiff and charge against and recover from it any loss accruing by reason of such default and resale. This contract is in evidence as plaintiff's exhibit 5-A and

is made a part hereof by reference. Market conditions improved subsequent to 1930, and the fair market price of these shoes in 1933 was considerably greater than in 1930.

3. Immediately upon execution of this contract plaintiff delivered to the defendant an additional letter of credit, unconditional and irrevocable, for $100,000 and agreed that when the letters of credit held by the Government should become exhausted similar letters of credit in like amounts would successively be furnished, continuing the plan of deposits, shipments, and drafts until the purchase of the specified number of shoes had been consummated within the time specified.

Art. X of the contract provided that shipments of shoes covered by the contract would be made by the Government as ordered by the plaintiff from the place of storage and in the quantity ordered by plaintiff according to the markings on the box, case, or other container. At the time of the execution of this contract, and subsequently until April 1933, both plaintiff and the defendant had an accurate inventory of all shoes on hand and the sizes and widths thereof at all the places of storage. The shoes were earmarked and set aside for plaintiff at various army posts and depots throughout the United States. Arts. I and III of the contract provided as follows:

> ARTICLE I. The contractor agrees to pay on the basis of the purchase price (per pair) for as many unused Army trench shoes, as it actually receives, and should the actual quantity of the property hereby sold by the Government to the contractor and available for delivery prove to be less than or, within reasonable limits, more than the quantity set forth herein, such discrepancies will not be considered as the basis of a claim by the contractor against the Government.
>
> ARTICLE III. The Government agrees that no surplus Army trench shoes, unused, will be advertised for sale nor sold by the War Department within five years from the date of this contract, to any other person, firm, or corporation, except in case of default by the purchaser, and demand has been made as provided in article XIII.

4. The unused trench shoes purchased by plaintiff were bought by the Government during 1918 for issue to troops. They were lined and heavily armored with hobnails and

double soles. Before being packed or boxed each shoe was dipped in oil to preserve the leather. At the time purchased, the entire quantity of shoes cost the Government about $6.80 a pair. At the time they were manufactured and delivered to the Government they were packed in very heavy cases with oil paper wrapped around the shoes so as to preserve them from the effects of air and moisture. The shoes were at all times in good condition and there had not been at any time prior to July 24, 1935, the expiration date of the contract in suit, any marked deterioration in the shoes or in their condition or wearing quality.

In December 1931 the War Department had samples of the trench shoes sold to plaintiff taken from lots stored at various depots and army posts and sent to the Boston, Mass., depot for test. The result of this test on 107 pairs of trench shoes made January 11, 1932, was as follows:

> These 107 pairs of shoes were tested by placing the toes of the shoes in a bench vise and bending the sole about 90° at least 20 or 30 times, as it would be bent when worn. This is considered a severe test for sole leather. Of the 107 pairs thus tested, 12 pairs were affected in one or both soles and the outsole stitching of one pair broke when tested, making 13 pairs affected out of 107 pairs tested. Not a single shoe was affected in the upper leather nor the upper stitching. The eyelets of three pairs came out when handled, because unusual thickness of upper leather prevented proper clinching.

Plaintiff guaranteed the shoes sold by it and under such guarantee it was required to replace only a very small percentage because of defects, poor condition, or wearing quality.

5. During the period from December 1931 until about April 10, 1932, negotiations were had between plaintiff and the War Department at the suggestion of officials of the latter looking to the acquisition by the War Department of about 316,000 pairs of the unused trench shoes covered by plaintiff's contract for distribution by the Government to the needy and the unemployed. In connection with these negotiations certain letters were signed by plaintiff's president, the contents of which were suggested and, in most

instances, written by certain officers of the War Department. These letters have no bearing upon nor are they material to the questions involved under the contract in suit. No agreement was arrived at as a result of these negotiations and they were terminated shortly after April 10, 1932, without any change or modification in the contract of July 24, 1930.

6. Between July 24, 1930, date of the contract involved in this suit, and December 15, 1933, plaintiff proceeded to sell shoes which it had purchased under this contract, and from time to time furnished defendant with shipping instructions and paid it for the shoes shipped. The market conditions and the demand for these shoes improved in and subsequent to the early part of 1933. The shoes disposed of by plaintiff under this contract were, for the most part, sold by it at prices ranging from $2 to $2.98 a pair.

7. Between April 5 and September 15, 1933, the defendant, without the knowledge or consent of plaintiff, appropriated and took for its own use 223,897 pairs of the trench shoes sold to plaintiff under the contract of July 24, 1930. This number of pairs of shoes was shipped to and used by the United States Civilian Conservation Corps. At least 179,509 pairs of the total number shipped were of sizes 7 to 11, both inclusive. No information was given plaintiff concerning this action and it was not until May 23, 1933, that plaintiff, by an investigation at one of the Government warehouses, ascertained that shoes were being withdrawn by the War Department from points of storage and shipped to the Civilian Conservation Corps at various points for use of members of that corps, whereupon plaintiff on May 23, 1933, wrote the Quartermaster General of the Army as follows:

> In the conference held in your office on the 4th ult. I recall that you inquired of me as to whether I desired to have cancelled the contract that now obtains between the Government and ourselves, dated July 24, 1930. To that inquiry you will also recall that I replied in the negative.
>
> The record will disclose that the basis of this contract was circular proposal no. 7-E, dated May 31, 1923. That circular described the sizes, specifications, and the location of the shoes we bought. Since the conference

which I have just referred to, I have personally checked several warehouses where these shoes were stored in accordance with that circular proposal and have ascertained that the Government is disposing of them.

To illustrate—at one fort I found that a quantity of our shoes had been issued to Conservation boys located there; that 3,897 pairs were shipped from this fort to a Conservation camp located at Ft. Meade, Maryland, on April 18th; that the entire quantity of shoes located at this point, aggregating slightly over five thousand pairs, were thus disposed of. At another warehouse I found approximately one hundred fifty cases of our shoes piled on the floor, and upon investigation I was told that they were being used to work up reassorted cases in order to get smaller sizes necessary to fill orders received from the various Conservation camps. Since our conference I have been informed that the Government has taken approximately one hundred fifty thousand pairs of our shoes, and these likewise consist of smaller sizes which will likely make it impossible for us to sell all of these shoes as contemplated.

I feel and am advised that this action on the part of the Government is a breach of its contract with our company.

I am, indeed, disappointed at this action on the part of the Government, particularly in view of the fact that I was in Washington from April 3rd until the 5th inst. and had occasion to visit the Department several different times in relation to this contract, but no intimation was ever given me of such action on the part of the Government.

For ten years I have handled these shoes. For the last six years I have devoted my entire time, labor, and efforts to their disposition and have disposed of approximately 1,700,000 pairs of them and for which the Government has received an average return of approximately $1.65 per pair.

In 1926 a quantity of shoes was shipped by the Government under letters of credit issued for us by the Farmers and Merchants Bank, against which drafts were drawn, and during which time this bank became insolvent and could not meet the payment of drafts in the amount of $196,000.00. I was not in any way legally bound or responsible to the Government for this sum of money, but, feeling a moral responsibility therefor, I borrowed this amount, personally guaranteeing its repayment, and the Government was paid this sum. I did not breach the contract at that time but carried this

load, and I do not feel that the Government should at this time breach this contract.

In July 1930, when the present contract was entered into, I again borrowed $25,000.00 and personally guaranteed repayment of the same. The sum was put up with the Government in connection with this contract. The contract has over two years to run, and I feel that the disposition of these shoes by the Government contrary to the same is very injurious to our business. For these ten years I have carried the burden of the disposition of these shoes, and if the Government by disposing of them prohibits our further carrying out the contract I will lose ten years' work and my individual liability will be such that my future efforts will be crippled, if not destroyed.

Business is improving, we are receiving inquiries for trench shoes, but, under the circumstances, we are not in position to answer these inquiries or to quote prices on these shoes, nor to make sales, because we might sell sizes and certain lots which have already been taken by the Government. So, under the circumstances, we would like to know if there is any suggestion that you care to make as to how we should continue, for with the lights before us we see nothing else for us to do except to mark time and await an adjustment of this matter by the Government.

On May 27, 1933, the Quartermaster General furnished the plaintiff the first official information concerning the use of these shoes by the Government, as follows:

With reference to your communication of May 23, 1933, in connection with your contract of July 24, 1930, for trench shoes, information is furnished that, due to an existing emergency requiring the equipment of enrolled members of the Civilian Conservation Corps by the War Department, it became necessary to utilize a portion of the trench shoes covered by your contract which were stored at posts and depots of the Army.

The War Department has on hand and is prepared to deliver to you, under the terms of your contract, such quantity of these shoes as you may call for.

In this connection it may be stated that the War Department on May 22nd last decided that no surplus Army supplies which have previously been sold by the Government, will be repurchased under any bids received for supplies required for the equipment of the Civilian Conservation Corps, or for any other purpose.

Early in April 1933 defendant began the assignment of these trench shoes for the purpose of equipping the Civilian Conservation Corps. The above-quoted letter carried the first official information to plaintiff of said action on the part of the defendant. The taking of the shoes by defendant for equipping the Civilian Conservation Corps continued until about September 11, 1933. Plaintiff sought information from defendant as to the number of shoes so used by defendant, but was unable to secure any information until the reply of the War Department to calls issued by this court after this suit was instituted. However, defendant continued to advise plaintiff that it could fill all orders for shoes which plaintiff might submit. As late as October 30, 1933, The Assistant Secretary of War wrote plaintiff that the Government stood ready to make deliveries of shoes so ordered by plaintiff.

The appropriation by the defendant for its own use of the shoes which had been sold to plaintiff, and shipment thereof to and for the use of the Civilian Conservation Corps, was the result of a decision by the Secretary of War that "The trench shoes will be used to meet the requirements of the Civilian Conservation Corps. The contract with the Georgia Wholesale Company will not be canceled and no negotiations will be had with that corporation with respect to their existing contract." Executive Orders Nos. 6101 and 6127 were issued by the President on April 5 and May 8, 1933, respectively, authorizing the use of surplus Government property for the benefit of the Civilian Conservation Corps. But these Executive Orders did not apply and were not intended to apply to any surplus property which had been sold or which was under contract of sale. The War Department did not base its action in using the shoes which had been sold to plaintiff upon any supposed authority to do so in the Executive Orders mentioned.

8. The table of allowance and price, in which these trench shoes were listed by the Government when they were shipped to the Civilian Conservation Corps during the period April to September 1933, was $2.32 a pair.

During and subsequent to May 1933 plaintiff continuously sought information from the defendant as to the number of pairs, sizes, and widths of the shoes withdrawn by it for

its own use and furnished the Civilian Conservation Corps but no information was ever furnished plaintiff concerning the matter and it was not until the evidence in this case was taken that any information was supplied by the defendant as to the number of pairs of shoes used by it for its own purpose. The 223,897 pairs of shoes used by the defendant were withdrawn from the various depots and army posts at approximately thirty-five different points of storage and consisted of the medium or popular sizes and widths of the lots on hand at the points of storage from which taken. By this action the entire stock was, as stated by one of defendant's witnesses, "robbed of desirable widths and sizes."

9. Shortly prior to August 11, 1933, plaintiff received an order from the American Jobbing Company, of Knoxville, Tenn., for 9,835 pairs of trench shoes of certain sizes and widths. The shoes covered by this order were on hand at the New Cumberland, Pennsylvania, depot prior to the withdrawal by the defendant for its own use of certain shoes covered by plaintiff's contract, and on August 11, 1933, plaintiff inquired of the defendant whether it had all of the shoes on hand at New Cumberland ready for immediate shipment. On August 19 the defendant replied that there were only 7,370 pairs of the widths, sizes, and specifications so referred to in the New Cumberland depot. Thereupon on August 28, 1933, plaintiff wrote Gen. W. R. Gibson, Quartermaster Supply Officer, at Brooklyn, New York, who was the executive officer of the War Department in charge of the execution and carrying out of plaintiff's contract, as follows:

> The information contained in your letter of the 19th inst. was surprising and disappointing. On February 19, 1932, and from the Hotel Powhatan, Washington, D. C., I wrote the New Cumberland General Depot, New Cumberland, Pennsylvania, as follows:
>
> "I am about to sell a lot of shoes in which there is included at the New Cumberland Depot the following:
>
> Without hobs, metallic fast.:

39 prs. 6½ E	120 prs. 6½ EE
38 " 7 E	120 " 7½ EE
24 " 7½ E	120 " 8 EE
48 " 8½ E	72 " 9 EE
30 " 5½ EE	48 " 9½ EE
48 " 6 EE	

Hobnails, metallic fast.: 72 prs. 7½ EE; 20 prs. 8½ EE.

"As the party I am dealing with on this lot is located in California, I do not want to get mixed up by selling sizes not available; therefore, I certainly will appreciate it if you will wire me Saturday, if possible, collect charges, care this hotel, whether or not the above-described shoes are on hand there. I would like to wire the California party over Sunday if it is convenient for you to furnish me this information Saturday."

In reply to that letter I received telegram on February 20, 1932, as follows:

"Metallic shoes on hand as itemized your letter 19th.
"(Signed) WILSON."

We have not ordered out any of these shoes since that time, and do I understand from your communication that you haven't these sizes on hand for this order or any future orders for these sizes?

My letter to you of August 11 with reference to an order which I had received from the American Jobbing Company, of Knoxville, Tennessee, included all these shoes, as you can ascertain from that communication.

Previous to that order I had been advised that a quantity of our shoes had been furnished by the Government without charge to the Civilian Conservation Corps but that the Government had reserved a sufficient amount of shoes on hand for our requirements. To illustrate—on June 20, 1933, I received a letter from Senator Walter F. George, quoting a communication from the War Department, one paragraph of which is as follows:

"This office is of the opinion that there are more trench shoes now remaining on hand than the Georgia Wholesale Company will be able to take during the two years the contract has yet to run."

And then I have in my possession a transcript of General DeWitt's testimony before the Committee on Military Affairs, United States Senate, which had under consideration the contract for toilet kits for the Civilian Conservation Corps, and at page 341 of the transcript of the testimony it appears that he said:

"We have a contract with the Georgia Wholesale Company to purchase at $1.55 a pair some 900,000 pairs of trench shoes. When the Civilian Conservation Corps enrollment began the question was presented to the Assistant Secretary that this company not having taken out any shoes for almost two years, under the terms

> of its contract, whether or not we would issue them free to the Civilian Conservation Corps, rather than go into the market and buy a large number of others at around $2.00, work shoes. I was instructed to use those shoes, but to deliver when called for by the Georgia Wholesale Company what they called for."
>
> So that, acting on the opinion of the War Department as expressed to Senator George, as well as upon General DeWitt's testimony as incorporated herein, we thought we were safe in making this sale.
>
> During the last week we have received inquiries from highly reputable concerns, one in Boston and another in New York, whose credit rating is excellent, for the entire lot of these shoes. In view of your communication of the 11th inst., as well as the information hereinabove referred to, we would like for you to advise us how to further proceed and what response we might make to these two concerns.
>
> You will realize that if we sell shoes which we cannot deliver we will incur a liability, and therefore it is necessary for us to have this information as quickly as possible in order that we might protect ourselves.

September 1, 1933, Gen. W. R. Gibson, Q. M. Supply Officer at Brooklyn, New York, depot, who was the officer of the War Department charged with the duty of carrying out plaintiff's contract on behalf of the United States, wrote the Quartermaster General at Washington as follows:

> Upon my return from leave my attention has been invited to two letters from the Georgia Wholesale Company which have been referred to your office for instructions. The first letter dated August 11, 1933, contains a list of 9,835 pairs of trench shoes for shipment from the New Cumberland depot and requests to be advised as to whether all of these shoes are on hand and ready for quick shipment. Pursuant to instructions from your office, the Georgia Wholesale Company was advised on August 19th of the sizes remaining available for shipment at New Cumberland. Their second letter is dated August 28th and was forwarded to your office yesterday for instructions. In this letter, after making reference to information which had been furnished them by Senator George and quoting from testimony that you had given before the Senate Committee on Military Affairs, they request to be advised as to how to further proceed in the matter referred to in their first letter.

I am at a loss to know how to handle this matter. Prior to issues made to the Civilian Conservation Corps, this office had a complete record of all trench shoes that had been declared surplus and obligated to the Georgia Wholesale Company under their contract. At that time there were approximately 1,000,000 pairs of trench shoes, most of which were located in considerable quantities at Fort Bliss, Boston, Brooklyn, Chicago, Columbus, New Cumberland, New Orleans, Philadelphia, Fort Sam Houston, Schenectady, and St. Louis, as well as smaller quantities at some twenty other places. Since the issues to the Civilian Conservation Corps have been made, this office has completely lost control of the trench shoe situation and has no knowledge of the quantity located at any point except those in this depot, and this quantity is changing from day to day. A shipment of 18,000 pairs was recently made to San Francisco on instructions from your office, and today we are preparing a shipment of about 12,000 pairs for Fort George G. Meade to fill requisitions submitted by the Third Corps Area.

If you will refer to the first letter of the Georgia Wholesale Company referred to above, you will notice that they are interested mostly in the medium sizes, and I know it to be a fact that practically all of these have been exhausted by issue to the Civilian Conservation Corps, leaving only the very small and the very large sizes available. So long as issues continue to the Civilian Conservation Corps, stocks everywhere will be changing, thus making it a very difficult matter to handle any deliveries to the Georgia Wholesale Company. If this office is to be charged with the execution of that contract, it will be essential to have information regarding the quantities and sizes available at all points of storage. The fact occurs to me that this matter could be handled better by your office than by this office and that it might be best to forward everything pertaining to the Georgia Wholesale Company in the future to your office for action.

Please be assured that I am not in any way trying to avoid responsibility, but rather to handle matters in such a way that the interests of the Government will be fully conserved.

General Gibson was called as a witness by plaintiff and testified as to the accuracy of the statements contained in the above-quoted letter.

Although plaintiff made repeated requests of the War Department for information as to the number of pairs of shoes withdrawn by the defendant from the various points of storage for its own use and as to the sizes and widths of the shoes so withdrawn, and as to the number of shoes on hand and the sizes and widths thereof at the various points of storage, that might be shipped on plaintiff's order, no information was ever given plaintiff with reference thereto but, instead, the War Department continued as late as October 30, 1933, to advise plaintiff that the Government stood ready and able to make deliveries of shoes as ordered by plaintiff, which was not the fact.

No information was furnished by the defendant to plaintiff as to the number of pairs of shoes withdrawn by defendant for its own use, the points of storage from which withdrawn, the sizes and widths of the shoes withdrawn and used, nor the number of pairs, sizes, and widths of the shoes remaining on hand after such withdrawals until such information was obtained pursuant to calls issued by the court. This situation rendered it impossible for plaintiff to proceed in the performance of the contract in accordance with the terms thereof and to rely upon the defendant to perform as it had promised. The withdrawal by defendant for its own use of 223,897 pairs of shoes of the medium or popular sizes and widths from the total number of approximately 1,094,037 pairs of shoes on hand at that time resulted in such confusion in the entire stock of shoes that neither the defendant nor the plaintiff had any accurate information with reference thereto. By this action the defendant placed itself in a position where it could not substantially perform its promises in accordance with its contract because of the impairment of the requisite subject matter, or means of performance. Moreover, the representations made by the defendant to plaintiff with reference to its ability to perform were not true and were obviously designed to mislead plaintiff into pursuing a course of conduct which might give the defendant an advantage because of its own conduct which was contrary to the terms and conditions of its contract. After numerous

unsuccessful efforts on the part of the plaintiff to ascertain from the defendant the existing condition with respect to the subject matter of the contract, plaintiff ceased further efforts to perform and, on February 23, 1934, instituted this suit to recover damages for breach of the contract by the defendant.

10. According to the records of the defendant, supplied by it in 1935 during the trial of this case upon the demand of plaintiff and pursuant to an order of the court, it had on hand on February 23, 1934, when this suit was instituted, 1,094,037 pairs of shoes covered by the contract of July 24, 1930. Previously plaintiff had given shipping instructions and paid for a total of 93,895 pairs of shoes under this contract.

The entire quantity of unused trench shoes covered by the contracts mentioned herein was sold by the defendant and purchased by plaintiff as a lot. It was known and understood by both parties to the contracts that the shoes were being purchased by plaintiff for resale; that the value of a large quantity of shoes is much greater if the assortment possesses a fair range of sizes and widths, and that shoes ranging in size from 6 to 11, inclusive, and of the popular or medium widths are more valuable and more easily sold in large quantities than the smaller or much larger sizes and widths. The shoes sold to plaintiff by the defendant, and described in detail in circular 7–E which is made a part of these findings by reference, constituted an assortment of a wide range of sizes and widths; for that reason the entire quantity of unused trench shoes, whether greater or less, within reasonable limits, than the number of pairs estimated and specified in circular 7–E was offered for sale by the defendant as a whole and sold to plaintiff as a lot at the unit price of $1.55 a pair in the contract of July 24, 1930.

The fair and reasonable market value of the 1,094,037 pairs of unused trench shoes covered by plaintiff's contract of July 24, 1930, in April 1933 and from that time until September 1933, during which time the defendant withdrew from various points of storage for its own use 223,897 pairs, was $2 a pair f. o. b. warehouses where stored.

11. There is no direct or competent evidence in this record to show that plaintiff was not able and willing to perform its contract of July 24, 1930, in accordance with its terms and within the time specified. Plaintiff had at no time defaulted in the performance of this contract. It kept on deposit with the defendant adequate unconditional and irrevocable letters of credit to cover all shoes ordered and a considerable amount of the letters of credit was in the hands of the defendant at and during the time the defendant removed and used, for its own purpose, a large quantity of the stock of shoes covered by this contract.

12. The outlay and expenses incurred by plaintiff in performance of the contract of July 24, 1930, to the date when further performance on its part was discontinued, because of the action of the defendant, was $64,663.

13. October 10, 1933, plaintiff submitted a written claim for damages for breach of the contract of July 24, 1930, to the Secretary of War and on October 30, 1933, the assistant Secretary of War rejected the claim.

14. On July 24, 1935, the defendant, through the Quartermaster Supply Officer, New York General Depot, at Brooklyn, New York, wrote plaintiff as follows:

> Under the provisions of article XIII of contract W 626 QM 9054, dated July 24, 1930, formal demand is hereby made that you immediately furnish shipping instructions and letters of credit in payment therefor covering the whole of the remainder of the trench shoes now undelivered.
>
> You are further advised that, under the provisions of this same article XIII, should you fail to comply with this demand within thirty (30) days from the date of this letter, the Government shall have the right to declare you in default as to the undelivered portion of the unused trench shoes and to declare all amounts due under the contract as immediately due and payable.

Thereafter, on September 17, 1935, the defendant, through the same official, wrote plaintiff as follows:

> On July 24, 1935, under the provisions of article XIII of contract W 626 QM 9054, dated July 24, 1930, formal demand was made upon you by registered letter that you immediately furnish shipping instructions and

letter of credit in payment therefor, covering the whole of the remainder of the surplus Army trench shoes now undelivered.

Thirty days having elapsed from the date of the said letter of July 24, 1935, and no shipping instructions and letters of credit in payment for the undelivered Army trench shoes having been furnished the Government, by direction of the Quartermaster General, the Government declares the Georgia Wholesale Company to be in default as to the whole of the undelivered portion of the unused trench shoes covered by the contract referred to, dated July 24, 1930, and declares all amounts due under the contract to be now due and payable to the Government.

DEFENDANT'S COUNTERCLAIMS

The defendant has filed three counterclaims: The third counterclaim filed October 2, 1935, will be mentioned first.

The merits of this counterclaim rest entirely on the facts as established by the record with reference to the main issue in the case, namely, the market value of the shoes on hand and undelivered at the time the Government took and used for its own purpose 223,897 pairs of shoes between April and September 1933. This counterclaim was filed for $1,134,775, the alleged difference between the contract price of $1.55 a pair for the shoes remaining in Government storage, for which plaintiff did not furnish shipping instructions, and an alleged market value of 35 cents a pair. Even on the defendant's theory of market value, there is no basis for a counterclaim in the amount stated. The number of pairs of shoes remaining undelivered at the time plaintiff ceased further performance of the contract, after deducting the number of pairs of shoes taken by the defendant and used for its own purpose, was 870,140 pairs. The contract price for this quantity at $1.55 a pair was $1,348,717. The value of this quantity at 35 cents a pair was $304,549. The difference is $1,044,168 instead of $1,134,775. The competent evidence of record overwhelmingly establishes as a fact that the fair and reasonable market value of the shoes covered by the contract of July 24, 1930, on hand and undelivered at the time plaintiff ceased further performance,

by reason of the acts of conduct by the defendant, was at least $2 a pair. There is, therefore, no merit in this counterclaim.

The facts relating to counterclaim no. 1, filed April 2, 1935, are as follows:

1. During the period from November 26, 1920, to April 21, 1921, defendant sold quantities of surplus canned meats, consisting of bacon, corned beef, roast beef, corned-beef hash, etc., which were subsequently shipped to plaintiff at various destinations. All shipments received by plaintiff prior to April 21, 1921, were paid for in accordance with the prices prevailing at the time such meats were purchased. On April 21, 1921, some of these meats were in plaintiff's storehouse or in transit to its buyers, and some of them were still in defendant's warehouse awaiting plaintiff's shipping instructions.

The Atlanta depot requisitioned the various Government warehouses for all shipments of meats subsequent to April 21, 1921, and these warehouses continued to invoice the Atlanta depot at prices plaintiff paid prior to that date. The record does not disclose at what prices the Atlanta depot billed plaintiff, either prior or subsequent to April 21, 1921. But the prices charged plaintiff on and subsequent to that date were the same as the prices charged the Thomas Roberts Company under its contract of April 21, 1921, for all canned meats then or thereafter declared surplus.

2. April 21, 1921, the defendant entered into a contract with the Thomas Roberts Company whereby all canned meats which had been or might thereafter be declared surplus were sold to the Thomas Roberts Company at certain prices, which were less than the prices plaintiff had paid and agreed to pay on shipments to it of the meats described in finding 1 hereof.

3. April 28, 1921, defendant notified its surplus-property officers of the contents of the contract with the Thomas Roberts Company, and authorized such officers to allow any former purchaser of surplus-property meats the privilege of returning them without expense to the Government, and to credit or refund to such purchaser by an adjustment of his

account to the original purchase price fixed for meats on condition that such former purchaser returned the meats purchased by him to the nearest Government storage; that such return must be made within 30 days from April 28, 1921, after which no adjustment in price would be made. No return of any meats was made by plaintiff. But such meats as the plaintiff then had on hand and in transit to its purchasers were handled and sold by plaintiff under an arrangement and understanding with the Thomas Roberts Company that it might do so at the same prices to plaintiff at which all surplus meats had been sold to the Thomas Roberts Company. This arrangement was acquiesced in by the surplus property officer and was subsequently approved by the Secretary of War. Prior purchasers were also given the additional privilege of canceling existing contracts upon which shipments had not yet been made.

Thereupon the defendant notified plaintiff of the privilege granted to purchasers of the meats, as in this finding set forth. In reply thereto plaintiff, by its letter of May 31, 1921, requested that it be permitted to retain shipments of the meats then on hand, and to receive future shipments on the basis of the Thomas Roberts Company prices. No reply to this letter was made by defendant.

4. September 22, 1922, the Local Board of Sales Control, of Washington, D. C., held a meeting to consider the claim then being made by the Government in the amount of $226,-453.47 against plaintiff growing out of the sale of the meats in question. This claim was based, and the counterclaim herein is based, upon the difference between the prices charged to and paid by plaintiff for shipments subsequent to April 21, 1921, which were the prices at which all meats had been sold to the Thomas Roberts Company, and the prices paid by plaintiff for shipments prior to April 21, 1921. Plaintiff then denied and still denies liability for this claim. The facts with reference to the matter and the decision of the board thereon follow:

> During the period from November 26, 1920, to April 21, 1921, there were shipped to the Georgia Wholesale Company on fixed price certain quantities of canned meats. These meats were paid for in full prior to April 21, 1921, at fixed prices then in existence.

Reporter's Statement of the Case

On April 21, 1921, a contract was entered into between the United States and Thomas Roberts Company, whereby all canned meats then or thereafter declared surplus were obligated to the Thomas Roberts Co. at a certain price.

On April 28, 1921, a letter was sent out to all surplus-control areas notifying surplus-property officers of the execution of this contract, etc., and in paragraph ten of said letter proposition was made that all purchasers of canned meats would be allowed to return any balances on hand to the nearest Government storage at their own expense, credit and refund of cash to be made by the various officers as required. Purchasers were also accorded the privilege of retaining their present holdings at the price effective when sold to them.

On May 27, 1921, the Thomas Roberts Co. wrote to the Georgia Wholesale Company, offering them the following proposition: On all meats then in their storehouses, in transit to buyers, and such meats not as yet taken delivery on their commitment, to have the Government allow them to cancel and rebuy from the Thomas Roberts Co. at a certain price.

On May 31, 1921, the Georgia Wholesale Company, in a letter to Capt. O. L. Ferris, Q. M. C., surplus-property officer, Atlanta, Ga., requested information as to whether or not it would be agreeable to the Government to let the Georgia Wholesale Company accept the Thomas Roberts Co. proposition. There is nothing of record in the files at Atlanta or here to show that the letter of the Georgia Wholesale Company was answered.

In spite of the fact, however, that the Atlanta depot was fully aware that all canned meats known to be surplus on April 21, 1921 (the date of contract with Thomas Roberts Co.), and all to be declared surplus thereafter were obligated to the Thomas Roberts Co., the Atlanta depot continued to ship to the Georgia Wholesale Company canned meats on their orders, and accepted payments on the basis of the Thomas Roberts Company contract prices until November 29, 1921, which act, while contrary to explicit instructions from the surplus property division, constituted a breach of contract on the part of the Government with Thomas Roberts Company, *was an implied acknowledgment* that the meats were delivered to the Georgia Wholesale Company on the basis of Thomas Roberts Company prices, and under their contract.

Now the Atlanta depot wants to collect the difference between the price effective prior to and subsequent to April 21, 1921, from the Georgia Wholesale Company.

The mistake made by the Atlanta depot lies primarily in the fact that the deliveries made subsequent to April 21, 1921, to the Georgia Wholesale Company were charged to them, when the same should have been charged to the account of Thomas Roberts & Co. for shipment to Georgia Wholesale Company.

Following is the unanimous recommendation of the board: In order to settle this matter on the basis of the facts in the case to the best interest of all concerned, it is recommended that as the Atlanta depot accepted payment for all canned meats sold and delivered to the Georgia Wholesale Company subsequent to April 21, 1921, on the basis of the Thomas Roberts Co. contract prices as proposed in Georgia Wholesale Company's letter of May 31, 1921, to Atlanta depot based on the letter from Thomas Roberts Company of May 27, 1921, to Georgia Wholesale Company, the Atlanta depot be directed to charge all canned meats thus sold and delivered to Georgia Wholesale Company as sold to account of Thomas Roberts Co. for delivery to Georgia Wholesale Company and credit Thomas Roberts Co. for the payments thus made.

5. September 25, 1922, the Quartermaster General, acting for and by authority of the Secretary of War, directed the commanding officer of the Atlanta Quartermaster Intermediate Depot as follows:

Reference is made to the alleged claim of the United States against the Georgia Wholesale Company for balance of $226,453.47 due on sales of canned meats made by the Atlanta depot.

This case has been the subject of careful consideration by the local board of sales control of this office. Pursuant to the decision of the board, the commanding officer, Atlanta, Georgia, is directed to charge all canned meats sold and delivered to the Georgia Wholesale Company since April 21, 1921, as sold and delivered to the account of Thomas Roberts & Company, on the basis of prices set forth in contract between the United States and Thomas Roberts & Company dated April 21, 1921.

On the same day the Quartermaster General mailed to plaintiff a duplicate of the above decision, with letter, as follows:

There is attached for your information and guidance copy of a letter dated September 25, 1922, written by

this office to the Atlanta Depot, containing instructions relative to action to be taken in the claim for balance alleged to be due the Government by your company on sales of canned meats made by the Atlanta Depot.

Pursuant to this order of the Quartermaster General, the commanding officer at Atlanta made up a statement of the account of plaintiff as to canned meats and rendered same to plaintiff. This statement follows:

STATEMENT OF ACCOUNT—CANNED MEATS

GEORGIA WHOLESALE COMPANY, JACKSON, GA.

Total cash deposited and credited to the account of canned meats from June 17th, 1920, to November 21, 1921		$468, 794. 65
Credit authorized by the local board of sales control on account of canned meats found unfit for consumption		468. 56
		469, 263. 21
Debit of canned meats as itemized sheets #1, 2, 3, 4		428, 951. 03
Credits transfer to regular and auction-sales account		40, 312. 18
Drafts cancelled:	*Debit*	*Credit*
#117	$10, 000. 00	$40, 312. 18
#178	3, 271. 92	[1] 2, 995. 83
#180	10, 000. 00	. 01
#181	10, 000. 00	
#182	10, 000. 00	
	43, 271. 92	43, 308. 02
Additional credit		36. 10
Balance		43, 271. 92

[1] Check.

6. This statement of account was mailed to plaintiff by the commanding officer November 27, 1922, with the following letter:

> Transmitted herewith are five drafts and letters of credit, nos. 117, 178, 180, 181, and 182, covering a total amount of $43,271.92, cancelled, payment having been received by transferring the amount of $40,312.18 and check for $2,995.83, and $0.01 in currency, making a total amount of $43,308.02, as indicated credit on the attached statement. There is an additional credit due you of $36.10 on account of one set of proceedings which were not taken in consideration in figuring up the account. The original amount of this proceeding was

$36.20, but an error was discovered amounting to $0.10, which leaves the net balance due you of $36.10.

Credit for the above amount will be given you on next drafts drawn.

Thereafter the Quartermaster General, acting under authority of the Secretary of War, directed the commanding officer at Atlanta as follows:

Inasmuch as the records show that the Georgia Wholesale Company should not have been debited subsequent to April 21, 1921, for the difference between the price originally made to them and the contract price for canned meats sold to Thomas Roberts & Company, action taken by the Atlanta depot in crediting the account of the Georgia Wholesale Company in the amount of $40,276.08 is approved by this office.

7. By the act of July 9, 1918, 40 Stat. 850, the President was authorized "through the head of any executive department, to sell, upon such terms as the head of such department shall deem expedient, to any person, partnership, association, corporation, * * * any war supplies, material, and equipment, and any byproducts thereof." By the act of July 11, 1919, 41 Stat. 104, it was further provided that "the Secretary of War be, and he is hereby, authorized to sell any surplus supplies * * * upon such terms as may be deemed best."

Pursuant to the act of July 9, 1918, and by direction of the Secretary of War, there was created the Office of Director of Sales, whose function was to supervise sales and to coordinate transfers to other departments of all surplus war materials. Beginning with March 15, 1921, the Director of Sales operated directly under the Assistant Secretary of War. There was further created, pursuant to this act and by direction of the Secretary of War, a sales organization known as the Surplus Property Division, which, during all the time hereinafter mentioned, operated as a branch of the Quartermaster Corps, effecting sales subject to the approval and direction of the Director of Sales.

Paragraph 312 of circular no. 1, issued by the Office of the Quartermaster General of the Army January 3, 1922, provided as follows:

312. *Local boards of sales control.*—(a) There will be originated by each quartermaster supply officer in charge of a surplus property area a surplus property local board of sales control. Each surplus property local board of sales control will consist of not less than three commissioned officers, designated by the quartermaster supply officer, one of whom shall be the surplus property officer. The surplus property local board of sales control will act as a board of review, approval, and direction with respect to all sales conducted under the direction of the quartermaster supply officer of the control depot within the following limits:

It will pass upon the acceptance of bids and may reject any or all bids or permit bids to be withdrawn where consideration of policies and fair dealings may require.

It will make adjustments of all claims arising between the purchaser and its particular control depot in matters of discrepancies in quantity, condition, or quality of goods delivered, or such other conditions involving consideration or fair dealing.

The board will make adjustment of claims and authorize the payment of refunds insofar as the law permits, where funds have not been covered into the Treasury.

(b) To the local board of sales control in the surplus-property division, this office, is reserved the right to determine fixed price on commodities for sale on the market or to a designated purchaser, in accordance with the principles and policies set forth in Article XVIII, compilation of Supply Circulars and Supply Bulletins, Purchase, Storage, and Traffic Division, General Staff, 1919.

This paragraph was amended by Changes No. 104, issued by the Office of the Quartermaster General of the Army August 23, 1922, as follows:

312. (*a*) There will be originated by each quartermaster supply officer in charge of a surplus-property area a surplus property local board of sales control. Each surplus local board of sales control will consist of not less than three commissioned officers, designated by the quartermaster supply officer, one of whom shall be the surplus property officer. The surplus property local board of sales control will act as a board of review, approval, and direction with respect to all sales conducted under the direction of the quartermaster supply

officer of the control depot within the following limits, but will not authorize a cancelation of a sale except as hereinafter provided.

It will pass upon the acceptance of bids, and may reject any or all bids or permit bids to be withdrawn where it is to the manifest interest of the Government to do so.

It may make final adjustment of all claims arising between the purchaser and its particular control depot in matters of discrepancies in the identity or quantity of goods delivered, or other conditions involving an improper delivery of the specified goods purchased; but it will not make adjustment in the unit prices or otherwise alter the essential terms of the sale except as to quantity sold.

The board will receive all claims and complaints in writing, signed by the claimant, and as soon thereafter as possible make an examination of and inquire into all of the facts and circumstances connected with the matter complained of; take and receive all testimony or other evidence bearing upon the claim or complaint; and in cases beyond its authority to make final adjustment, it will transmit the same, together with its recommendation, through the Office of the Quartermaster General to the Office of the Assistant Secretary of War for final action.

Counterclaim No. 2 was filed May 9, 1935, and the facts with reference thereto are as follows:

1. On October 14 and November 15, 1921, and on February 6, March 2, and March 23, 1922, plaintiff purchased from the defendant at auction large quantities of surplus supplies, consisting of underwear, shoes, leggings, saddles, etc., stored at Atlanta, Georgia, and other points in the Southeast under the direction of the surplus property control officer for the southeastern area.

2. The sales were advertised to be held under conditions fully set forth in a printed catalogue of the goods to be sold. The material terms provided for auction sales at Government storehouses of listed property "as is, where is, without warranty or guaranty as to quality, character, condition, size, weight, or kind", and stated that no representative of the Government was authorized to make any statement or representations as to these matters, and that large lots would be subdivided so as to give opportunity to smaller buyers.

Inspection was invited by the bidders for one week before the sale and was to be relied on in lieu of warranties. The catalogue further stipulated that, "While samples of the property are believed to be representative and will be exhibited at the time of the sale, prospective buyers are urged to make an inspection of the property at its place of storage prior to the sale. This is especially enjoined owing to the fact that the Government will not entertain claims of any nature whatever should the property bought not come up to the standard of the sample or expectations of the purchasers in any particular whatever."

3. At these auctions plaintiff submitted its bid for portions of large lots of clothing, underwear, shoes, leggings, saddles, etc., and separate written memoranda of each sale or purchase were issued upon what is known as "Form SP No. 13", signed by the surplus control property officer in charge and acknowledged by the signature of plaintiff. These memoranda stated the grade of the articles and the catalogue and memoranda described the greater portion of the several lots auctioned off as being "new" or grade A, and a small portion thereof as grade B or "used."

The several lots of supplies bid in by plaintiff were small fractions of large masses of articles catalogued, and not specific articles identified at the auctions nor at the time the memoranda of sales were executed by plaintiff and the control officer, beyond the description set forth in findings 2 and 3 hereof.

4. These large masses of articles catalogued were baled or packed in containers and stored in great piles in the storehouses where the auctions were held. Plaintiff only saw the samples displayed. The large masses of articles catalogued were mostly inaccessible on account of the enormous quantities stored in the warehouses. When the goods so purchased were delivered, plaintiff made complaint that the goods delivered were inferior to those purchased. Thereupon an inspection was made by the local board of sales control, which reported large quantities of these goods were of an inferior and different grade as compared with the samples displayed at the auctions. Acting upon such inspection, the local board of sales control considered and recommended

lower adjusted prices which the board considered fair and reasonable for the goods delivered.

5. The surplus property control officer in charge, acting on the recommendations of the board, issued corrected sales memoranda on "Form SP No. 13" which were signed by him and plaintiff. These new memoranda redescribed the property and fixed lower adjusted prices as recommended by the board, which were paid.

6. February 27, 1919, the Secretary of War issued Supply Circular No. 16, as follows:

> Confirming verbal instructions of December 17, 1918, there is established in the Purchase, Storage, and Traffic Division a Sales Branch under an officer designated as the Director of Sales, whose duties will be as follows:
>
> (*a*) To formulate, supervise, coordinate, and direct the selling of surplus supplies, material, equipment, by-products thereof, buildings, plants, factories, or lands embraced within the act of Congress approved July 9, 1918;
>
> (*b*) To supervise and direct the sale, in accordance with existing regulations and statutes, of all other supplies, material, and property not embraced within the act of Congress approved July 9, 1918, but the sale of which may be desired in the public interest, as may be directed from time to time by the Director of Purchase, Storage, and Traffic;
>
> (*c*) To direct and supervise the compilation of records covering all sales of any war supplies, material, lands, factories, or buildings and equipment, so that a detailed report may be made to Congress on the first day of each regular session, in accordance with the provisions of the act of Congress approved July 9, 1918.

7. On May 19, 1920, the Secretary of War promulgated Purchase & Storage Notice No. 114, which was in part as follows:

> In compliance with paragraph 54, subparagraph 2, Article XVIII, Compilation of Supply Circulars and Supply Bulletins, and memorandum of Assistant Chief of Staff, to the Quartermaster General, Director of Purchase & Storage, dated March 25, 1920 (Board of Sales Adjustment), the surplus property "local board of sales control", office of the Quartermaster General, Director of Purchase and Storage, shall be as follows: * * *

The surplus property local board of sales control will act as a board of review, approval, and direction with respect to all sales conducted by the Surplus Property Division within the following limits: It will pass upon the acceptance of bids, and may reject any or all bids or permit bids to be withdrawn where consideration of policies and fair dealing may require. It will determine fixed prices on commodities for sale on the market or to a designated purchaser in accordance with the principles and policies set forth in Article XVIII, Compilation of Supply Circulars and Supply Bulletins, and Memorandum of Assistant Chief of Staff, dated March 25, 1920 (Board of Sales Adjustment), and such other policies and principles as are or may be set forth from time to time in clearance and memoranda from the Office of the Director of Sales.

The surplus property local board of sales control will make adjustments of all claims arising between a purchaser and the Surplus Property Division in matters of discrepancies in quantity, condition, or quality of goods delivered, or such other conditions involving consideration or fair dealing. The board will make adjustments of claims and authorize the payment of refunds insofar as the law permits, where funds have not been covered into the Treasury. As far as it is consistent with existing orders, regulations, and instructions, the local board of sales control will take the necessary action to minimize the number of claims to be submitted to the board of contract adjustment.

BOARD OF CONTRACT ADJUSTMENT

Under the provisions of General Orders, No. 103, November 6, 1918 (sec. IV, Board of Contract Adjustment), all claims or disputes which cannot be satisfactorily or legally settled by the surplus property local board of sales control shall be referred to the Board of Contract Adjustment with full statement of facts.

8. On July 24, 1920, the War Department, by authority of the Secretary of War, issued circular no. 9, reading as follows:

There will be organized by each depot quartermaster in charge of a surplus property area, as outlined in Purchase and Storage Notice No. 157, June 26, 1920 (decentralization of surplus property activities), a surplus property local board of sales control. Each surplus

property local board of sales control will consist of not less than three commissioned officers, designated by the depot quartermaster, one of whom shall be the surplus property officer. The surplus property local board of sales control will act as a board of review, approval, and direction, with respect to all sales conducted under the direction of the depot quartermaster of the control depot within the following limits:

It will pass upon the acceptance of bids, and may reject any or all bids or permit bids to be withdrawn where consideration of policies and fair dealing may require.

It will make adjustments of all claims arising between the purchaser and its particular control depot in matters of discrepancies in quantity, condition, or quality of goods delivered, or such other conditions involving consideration or fair dealing.

The board will make adjustment of claims and authorize the payment of refunds, insofar as the law permits, where funds have not been covered into the Treasury.

To the local board of sales control in the Surplus Property Division, this office is reserved the right to determine fixed price on commodities for sale on the market or to a designated purchaser, in accordance with the principles and policies set forth in Article XVIII, Compilation of Supply Circulars and Supply Bulletins.

The amendments to these orders dated January 3 and August 23, 1922, are set forth in finding 7 on counterclaim no. 1, *supra*, and are by reference made a part hereof, and the facts stated in finding 7 are also made a part hereof by reference insofar as they are applicable.

9. All refunds that were made were paid from funds under the control of the surplus property officer at Atlanta, Georgia, and not from the Treasury. There is no evidence that any refund was made in this case.

10. In 1925 the United States instituted two actions at law in the District Court of the United States for the Northern District of Georgia, Atlanta Division, against Georgia Wholesale Company, Nos. 832 and 853, respectively. These actions were based on the transactions alleged in the defendant's counterclaim herein. No evidence was introduced in either of these actions, in each of which on March 23, 1929, the following proceedings were had:

On motion of plaintiff's counsel made in open court, it is ordered by the court that the above case be and the same is hereby dismissed.

11. If defendant is entitled to recover on this counterclaim the amount due is $137,916.23. Plaintiff has at all times denied the claim.

The court decided that plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Under the contract of July 24, 1930, the defendant sold and plaintiff purchased, and agreed to furnish shipping instructions and pay for within five years thereafter, or by July 24, 1935, the entire quantity of unused army trench shoes which the defendant had on hand. All of the trench shoes owned by the defendant had been declared surplus property and were duly advertised for sale. These shoes were stored in various places throughout the United States and, since the first contract with reference to the shoes was entered into on June 16, 1923, plaintiff had accurate information as to the approximate number of pairs of shoes stored at that time in Government warehouses at approximately one hundred different places throughout the United States. In the contracts between plaintiff and the defendant the total estimated quantity of shoes on hand in Government warehouses was 2,664,902 pairs. Based upon the records of the defendant compiled during the trial of this case, subsequent to February 1934, there is a slight discrepancy between the total number of pairs of surplus trench shoes in the possession of the United States and the number mentioned in the contracts with the plaintiff, but this is not material here. The facts show that the number of pairs of shoes covered by plaintiff's contract of July 24, 1930, on hand at the time plaintiff ceased further performance by reason of the defendant's action and conduct, as disclosed in the findings, in taking and using for its own purpose 223,897 pairs of shoes, was 1,094,037 pairs.

In the performance of its contracts plaintiff furnished shipping instructions and paid for 1,651,163 pairs of shoes at prices ranging from $1.55 to $1.60 a pair, according to

its agreements. Plaintiff was at no time in default under its contract of July 24, 1930, involved in this case. Plaintiff's contract had more than two years to run at the time of the alleged breach thereof by the defendant in April 1933 in taking for its own use 223,897 pairs of shoes from the stock sold to plaintiff and its refusal to furnish plaintiff with any information as to the number of pairs of shoes taken, the sizes and widths thereof, and the places from which removed. We think it is clear that this was a breach of the contract by the defendant which entitled plaintiff to cease further efforts to perform and to demand compensation for whatever damage it had sustained by reason thereof. The measure of plaintiff's damages under the rule of law applicable to cases of this kind is the difference between the fair and reasonable market value of the shoes on hand at the time of the defendant's delivery of the 223,897 pairs of shoes to itself, which occasioned the breach of the contract, and the contract price. *United States* v. *Burton Coal Co.*, 273 U. S. 337. The great preponderance of the competent evidence of record establishes beyond question that the fair and reasonable market value of the 1,094,037 pairs of shoes on hand and undelivered at the time of the defendant's breach of the contract in 1933 was at least $2 a pair. A number of witnesses well qualified to testify as to the fair market value of these shoes were called and testified with reference to the matter. Practically all of them had bought large quantities of these shoes from plaintiff which they had used or resold and they were thoroughly familiar with the market value, the condition and the wearing quality of the shoes. The fair market value in 1933 for the entire quantity of shoes involved in the case was fixed by these various witnesses at from $2 to $2.50 a pair. These witnesses all testified that the shoes purchased by them from plaintiff were satisfactory and that they had given excellent service when worn under the most adverse conditions. Any shoes found to be defective were replaced by plaintiff. At the time of the defendant's breach plaintiff made an investigation of the cost of similar shoes from persons or concerns able to supply the same and found that the cost of such shoes would be about $2.50 a pair. The shoes, for which plaintiff had

furnished shipping instructions and paid for, were sold by it at prices ranging from approximately $2 to $2.98 a pair.

In August 1933 while the defendant was removing from places of storage shoes which had been sold to plaintiff, and using for its own purpose a large number of pairs of shoes in the medium or popular range of sizes and widths, plaintiff received an order from one of its customers for about 10,000 pairs of shoes at $2 a pair for immediate shipment. Upon inquiry of the defendant plaintiff was advised that only approximately 7,000 pairs of these shoes could be supplied from the designated place of storage. The reason why this order could not be filled from the place of storage from which the customer had ordered shipment was that the defendant had withdrawn from that point of storage for its own use shoes of the sizes and specifications covered by the purchase order received by plaintiff. Plaintiff lost this contract.

The shoes covered by plaintiff's contract were sold to it f. o. b. place of storage and it was necessary, in order for plaintiff to be able to sell these shoes and fix the price thereof to its customers, that the information furnished it under its contract remain accurate as to the number of pairs of shoes, and the sizes and widths on hand at each point of storage. The defendant was without authority to take any action which would make it difficult or impossible, either for the plaintiff or itself, to perform the contract in accordance with its terms. Where one party to a contract prevents its performance, or puts it out of his own power to perform it, in accordance with its terms, the other party may regard it as terminated and demand whatever damages he has sustained thereby. *Lovell, et al.* v. *St. Louis Mutual Life Insurance Co.*, 111 U. S. 264. In *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 551, the court said: "'If the jury find from the evidence that the plaintiffs were in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly or carelessly and negligently interfered with and hindered and prevented the plaintiffs in such performance to such an extent as to render the performance of it difficult, and greatly decrease the profits which the plaintiffs would otherwise have made,

then and in such case such interference was unauthorized and illegal and would have justified the plaintiffs in abandoning the contract, and would have entitled them to recover such damages as they actually suffered by being hindered and prevented from performing such contract.' * * * Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance." See *Roehm* v. *Horst*, 178 U. S. 1; *Lovell et al.* v. *St. Louis Mutual Life Insurance Co., supra; Gray & Co. Inc.*, v. *Cavalliotis*, 276 Fed. 565, 570. "In promise for an agreed exchange a promissor is discharged from the duty of performing his promise if substantial performance of the return promise is impossible because of the non-existence, destruction, or impairment of the requisite subject matter or means of performance." Restatement of the Law of Contracts Par. 281, p. 415.

There is no merit in the contention of counsel for the defendant that the contract was divisible. This contention was made on demurrer and was overruled. The entire quantity of unused trench shoes was offered for sale and sold to the plaintiff as a whole, whether the quantity on hand was within reasonable limits more or less than the estimated quantity stated in the proposal and in the contracts. This contention of the defendant is based upon the fact that a price of $1.55 a pair was fixed in the contract involved in this suit. But the fixing of a price per unit for the ascertainment of compensation as a whole does not render a contract severable. Moreover, the contract of July 24, 1930, was entered into on the same basis as previous contracts between the parties and in the prior contracts the unit price a pair for the entire quantity of shoes sold was changed from time to time, showing clearly that the entire quantity of unused trench shoes was being sold as a whole rather than by the pair. See *Purington Paving Brick Co.* v. *Metropolitan Paving Co.*, 4 Fed. (2d) 676. It is obvious

from the nature of the transaction, the large quantity of shoes being sold, and the fact that the lot contained a very large number of very small and very large sizes that if the transaction had been a purchase and sale by the pair different unit prices a pair would have been fixed or the shoes would have been grouped as to sizes and widths and different unit prices a pair specified for each group.

The defendant makes some additional contentions to the effect that plaintiff rather than defendant breached the contract by failing to furnish shipping instructions for the entire quantity of the shoes covered by the contract; that the appropriation by the defendant for its own use of a portion of the shoes sold to plaintiff did not constitute a breach of the contract entitling plaintiff to damages; that plaintiff can not recover because it did not minimize its damages by furnishing shipping instructions for the remainder of the shoes accompanied by a tender of payment, and that, in any event, the plaintiff cannot recover because the market price of the shoes at the date of the breach in 1933 was less than the contract price therefor. We think these contentions are without merit in this case. In view of the facts established by the record and what has been said above, it is unnecessary further to discuss these contentions.

By reason of the defendant's breach of the contract, plaintiff is entitled to recover $492,316.65.

Plaintiff also seeks to recover $25,000 paid to defendant at the time of execution of the contract of July 24, 1930, in compromise and full settlement of all claims and counterclaims, and matters growing out of the contract of June 16, 1923, as supplemented on February 19, 1924, and August 6, 1926. But we are clear that this payment cannot be recovered as an item of damages for breach of the contract of July 24, 1930. It had no connection whatever with the performance or non-performance of the contract involved in this suit. It was paid in compromise and full settlement of all matters and controversies existing between the parties at the time, which arose under the prior contracts.

The last item of plaintiff's claim is for $64,663, outlay for expenses of its sales organization in the performance of the

contract involved in this suit to the date of breach thereof by the defendant. We think it is clear that this item cannot be allowed. In certain cases losses arising from expenses incurred in the performance, or in preparation of performance, of a contract with the Government may be included in the measure of damages for a breach thereof by the defendant. *United States* v. *Behan*, 110 U. S. 338, 339. *Whitbeck, Receiver*, v. *United States*, 77 C. Cls. 309. But the rule applied in those cases is not applicable here. Plaintiff performed no service and furnished no material or equipment to the United States. This was a sales contract in which the relation between the United States and the plaintiff was that of seller and purchaser. The property constituting the subject matter of the contract was purchased by plaintiff for resale and the Government cannot be held liable for any expenses incurred by plaintiff in carrying on its business of selling the shoes for which it furnished shipping instructions and paid for, unless it be shown that some portion of the outlay in expenses was incurred in respect of and directly related to that portion of the contract remaining unperformed at the date of breach. In other words, it is incumbent upon plaintiff to prove that it sustained an actual loss by reason of the expenditures and the extent thereof which was directly attributable to a breach of the contract by the defendant. This has not been done. It was understood by both parties at the time the contract was entered into that the shoes were being purchased by plaintiff for resale. It was for this reason that plaintiff was given five years within which to perform. It certainly knew that it would be necessary for it to incur expenses in carrying on its business of reselling the shoes. In doing this it was performing no service for the Government. Judgment in favor of plaintiff for these expenses would simply be awarding it increased profits on the shoes shipped by the defendant and paid for by the plaintiff. Clearly this cannot be done. We have held that plaintiff is entitled to recover the difference between the market price of the shoes on hand when defendant breached the contract in the manner hereinbefore stated, and the contract price

thereof. This amount in circumstances of this kind is the just measure of damages to which the plaintiff is entitled.

There remains to be considered the counterclaims made by the defendant. Counterclaims numbers 1 and 2 for $226,-453.47 and $137,916.23, respectively, present substantially the same question, to-wit, whether the Local Board of Sales Control had authority and acted within its jurisdiction in making the adjustments disclosed by the facts. The defendant claims that the Board exceeded its authority and jurisdiction. We are of opinion that there is no merit in this contention and that the counterclaims, upon the facts, must be dismissed.

The Secretary of War had statutory authority to sell the surplus supplies upon such terms as might be deemed best and he had authority to make any adjustments that were justified by the facts in the interest of fair dealing. It is obvious that the Secretary of War could not personally handle the great number of cases and controversies arising from the sale of great quantities of surplus property, and it was only right and proper that he should establish in his department some organization or means whereby these controversies could be thoroughly and adequately investigated and determined. This he did through the office of the Quartermaster General of the Army and the creation of the Surplus Property Division of the War Department, the Local Board of Sales Control, and the Board of Contract Adjustment. The Local Board of Sales Control was created and acted under authority of the Secretary of War. Under the rules and regulations of the War Department the Board of Sales Control acted within its jurisdiction and authority in making the decisions and adjustments disclosed by the facts found with reference to both of these counterclaims. In *American Stores Co.* v. *United States*, 68 C. Cls. 128, this court said: "That the authority of the Secretary of War under the Act of July 11, 1919, in the sale of surplus supplies, 'upon such terms as may be deemed best', was more than that of a mere sales agent, and a refund to a vendee in accordance with the custom of the trade on goods not yet resold by

it, or the difference between the price previously agreed to and paid and a lower price thereafter offered to purchasers, was within the Secretary's authority, notwithstanding the absence of a benefit passing from the vendee." *United States* v. *Koplin*, 24 Fed. (2d) 840; *Jacob Levy & Bros.* v. *United States*, 63 C. Cls. 126; *Lamport Manufacturing Supply Co.* v. *United States*, 65 C. Cls. 579; *American Stores Co.* v. *United States*, *supra;* and *Silberstein & Son, Inc.* v. *United States*, 69 C. Cls. 373.

Defendant's counterclaim number 3 requires little discussion. It is based on the proposition that the fair market value of the number of pairs of shoes undelivered was 35 cents a pair at the date the plaintiff's contract was breached by defendant. The record establishes and we have found as a fact that the fair market value of the shoes remaining undelivered at the date of defendant's breach of the contract was $2 a pair. This counterclaim must therefore fail. The testimony of witnesses called by the defendant, and upon which the defendant relies in support of this counterclaim, cannot be given any weight in view of all the other evidence in the record by witnesses better able and qualified to testify as to the fair market value of the property. Defendant's witnesses did not, in expressing their opinion, give proper consideration to the essential elements constituting market price or value. Of all the witnesses called by the defendant, the one best qualified to testify as to the fair market value of the shoes in question was not questioned by the defendant with reference to the market value. He had purchased from plaintiff and handled as many as 200,000 pairs of the shoes in question and it does not appear from his testimony that he experienced any difficulty in the matter with reference to the condition or the wearing quality of the shoes.

Plaintiff is entitled to recover $492,316.65. Judgment in its favor for that amount will accordingly be entered. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

BENJAMIN B. FOSTER AND ROBERT R. TODD, EXECUTORS OF THE ESTATE OF ANNA FOSTER FORD, DECEASED, v. THE UNITED STATES

[No. 42642. Decided December 7, 1936. Motion for new trial overruled, with opinion, April 5, 1937]

On the Proofs

Income tax; redemption of capital stock; cost chargeable to capital account.—Payment by a corporation to stockholders in redemption of a portion of its capital stock for cancellation was not, under section 115 of the Revenue Act of 1928, payment of a dividend or a distribution of earnings or profits, but was in partial liquidation of the corporation, and, as such, chargeable to capital account.

Same; exemption of subsequent dividend from taxation.—Where a corporation made payments to stockholders in redemption of a portion of its capital stock for cancellation, such payments were chargeable to capital account as a partial liquidation of the corporation and cannot be treated as a dividend or distribution of earnings or profits under section 115 of the Revenue Act of 1928, in order to exempt a subsequent dividend from income taxation. *Helvering* v. *Canfield*, 291 U. S. 163, and other cases differentiated.

The Reporter's statement of the case:

Mr. Hugh C. Bickford for the plaintiffs. *Mr. C. Clifton Owens* was on the briefs.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Anna Foster Ford, who was originally the plaintiff in this case, died March 30, 1936, and Benjamin B. Foster and Robert R. Todd, executors of her estate, have been substituted as plaintiffs.

2. March 12, 1931, the decedent filed her income tax return for the calendar year 1930 and reported therein a taxable net income of $29,697.29 and a tax liability thereon of $850.28, which she paid at the time of filing the return.

3. The decedent was, on February 11, 1930, the owner of record of 155 shares of a par value of $100 per share of the total of 1,500 shares of the capital stock of the Foster Lumber Company, a Missouri Corporation. She acquired this stock prior to March 1, 1913, at a cost less than the March 1, 1913, value, which March 1, 1913, value it is agreed was at least $2,000 per share. The Foster Lumber Company on February 11, 1930, duly declared a cash dividend of 150 per cent of its capital stock payable on that date to all stockholders of record on that date. The decedent received during the calendar year 1930 the amount of $23,250.00 from the Foster Lumber Company in payment of the said dividend of February 11, 1930, on the 155 shares of stock owned by her. The entire amount of this dividend of $23,250.00 received by her during 1930 was included in the individual income tax return filed by her for that year as income and a tax paid thereon.

4. On July 18, 1932, the decedent filed with the Collector of Internal Revenue at Kansas City, Missouri, a claim for the refund of $712.01 of the income tax paid by her for the year 1930. This claim was predicated on the basis that of the dividend of $23,250.00 received by her from the Foster Lumber Company during 1930 and reported as taxable in its entirety the amount of $14,754.22 was paid out of surplus accumulated or appreciation of land and timber arising before March 1, 1913, and was to that extent and for that reason exempt from tax. The Commissioner of Internal Revenue rejected the said claim for refund on September 21, 1933.

5. The Foster Lumber Company was a Missouri Corporation which had issued 2,000 shares of common stock having a par value of $100 each. It was formed for the purpose of manufacturing, buying, and selling lumber, building material, and merchandise generally; also for buying, selling, and leasing lands. On March 1, 1913, the earnings or profits accumulated and increase in value of property owned by the company were in excess of $3,725,000.

6. The following tabulation sets forth with reference to the Foster Lumber Company, in column "A" the period involved, in column "B" the amount of the earnings, or profits

for that period, in column "C" the amount of the dividend distributed on the last day of the indicated period and in column "D" the balance of the earnings, or profits accumulated subsequent to February 28, 1913:

"A"	"B"	"C"	"D"
Period	Earnings or Profits	Distributions	Balance of Earnings or Profits Accumulated Since February 28, 1913
Mch. 1, 1913 to Dec. 31, 1913	$54, 488. 12	none	$54, 488. 12
Jan. 1, 1914 to Feb. 10, 1914	3, 322. 90	$100, 000. 00	none
Feb. 10, 1914 to Dec. 31, 1914	26, 998. 60	none	26, 998. 60
Jan. 1, 1915 to Feb. 9, 1915	21, 800. 13	100, 000. 00	none
Feb. 9, 1915 to Dec. 31, 1915	182, 226. 72	none	182, 226. 72
Jan. 1, 1916 to Feb. 8, 1916	38, 890. 35	200, 000. 00	21, 117. 07
Feb. 8, 1916 to Dec. 31, 1916	335, 685. 13	none	356, 802. 20
Jan. 1, 1917 to Feb. 13, 1917	52, 944. 91	300, 000. 00	109, 747. 11
Feb. 13, 1917 to Mch. 16, 1917	38, 169. 59	50, 000. 00	97, 916. 70
Mch. 16, 1917 to Dec. 31, 1917	358, 301. 60	none	456, 218. 30
Jan. 1, 1918 to Feb. 12, 1918	34, 852. 96	300, 000. 00	191, 071. 26
Feb. 12, 1918 to Jun. 22, 1918	107, 878. 22	100, 000. 00	198, 949. 48
Jun. 22, 1918 to Oct. 2, 1918	84, 642. 91	80, 852. 20	202, 740. 19
Oct. 2, 1918 to Dec. 31, 1918	75, 514. 77	none	278, 254. 96
Jan. 1, 1919 to Feb. 11, 1919	55, 306. 55	300, 000. 00	33, 561. 51
Feb. 11, 1919 to Dec. 31, 1919	437, 056. 62	none	470, 618. 13
Jan. 1, 1920 to Feb. 10, 1920	51, 764. 03	300, 000. 00	222, 382. 16
Feb. 10, 1920 to Dec. 31, 1920	421, 876. 82	none	644, 258. 98
Jan. 1, 1921 to Feb. 8, 1921	3, 269. 75	200, 000. 00	447, 528. 73
Feb. 8, 1921 to Dec. 31, 1921	28, 137. 05	none	475, 665. 78
Jan. 1, 1922 to Feb. 14, 1922	25, 585. 23	200, 000. 00	301, 251. 01
Feb. 14, 1922 to Dec. 31, 1922	186, 655. 92	none	487, 906. 93
Jan. 1, 1923 to Feb. 13, 1923	19, 938. 46	300, 000. 00	207, 845. 39
Feb. 13, 1923 to Dec. 31, 1923	149, 306. 62	none	357, 152. 01
Jan. 1, 1924 to Feb. 12, 1924	20, 649. 83	200, 000. 00	177, 801. 84
Feb. 12, 1924 to Dec. 31, 1924	159, 298. 68	none	337, 100. 52
Jan. 1, 1925 to Feb. 10, 1925	36, 057. 51	250, 000. 00	123, 158. 03
Feb. 10, 1925 to Dec. 31, 1925	292, 967. 27	none	416, 125. 30
Jan. 1, 1926 to Feb. 9, 1926	29, 521. 05	300, 000. 00	145, 646. 35
Feb. 9, 1926 to Dec. 31, 1926	246, 765. 70	none	392, 412. 05
Jan. 1, 1927 to Feb. 8, 1927	25, 195. 83	300, 000. 00	117, 607. 88
Feb 8, 1927 to Dec. 31, 1927	216, 816. 76	none	334, 424. 64
Jan. 1, 1928 to Feb. 14, 1928	34, 957. 28	250, 000. 00	119, 381. 92
Feb. 14, 1928 to Dec. 31, 1928	255, 823. 73	none	375, 205. 65
Jan. 1, 1929 to Feb. 12, 1929	30, 587. 52	350, 000. 00	155, 793. 17
Feb. 12, 1929 to Oct. 10, 1929	174, 785. 81	975, 000. 00	none
Oct. 10. 1929 to Dec. 31, 1929	60, 446. 75	none	In issue
Jan. 1, 1930 to Feb. 11, 1930	22, 311. 42	225, 000. 00	In issue
Feb. 11, 1930 to Dec. 31, 1930	176, 314. 60	none	In issue

7. At the time of the declaration and payment by the Foster Lumber Company of the dividend of $100,000.00 on February 10, 1914, its earnings and profits accumulated subsequent to February 28, 1913, were but $57,811.02.

8. At the time of the declaration and payment by the Foster Lumber Company of the dividend of $100,000.00 on February 9, 1915, its earnings and profits accumulated subsequent to February 28, 1913, and not distributed were but $48,798.73.

Reporter's Statement of the Case

9. The dividends distributed by the Foster Lumber Company from 1916 to, and inclusive of, February 12, 1929, were distributed from earnings and profits accumulated subsequent to February 28, 1913.

10. The capital stock of the Foster Lumber Company has always been owned by members of the Foster family. Three members of the family who had removed to California were stockholders in the corporation, and in order that they might retire from ownership of and participation in the affairs of the corporation and also that a rearrangement of interests might be effected it was decided to retire and cancel 500 shares of the company's capital stock. Accordingly, under date of July 20th, 1929, the Foster Lumber Company by formal written notice to all of its stockholders requested that each of them notify it if they were in favor of a reduction in the capital stock of the company from $200,000.00 to $150,000.00 by the acquisition and cancellation by the company of 500 shares of its outstanding capital stock of 2,000 shares from the therein named stockholders in the proportions and for the amounts set forth in that letter.

11. On October 1, 1929, a meeting of the stockholders of the Foster Lumber Company was held and a resolution adopted providing for the reduction of the capital stock of the company from $200,000 divided into 2,000 shares to $150,000 divided into 1,500 shares, and on October 8, 1929, the company having complied with the laws of the State of Missouri providing for the decrease of capital stock, the Secretary of State certified to the decrease therein to the amount of $150,000.

12. On October 10, 1929, the Foster Lumber Company distributed $1,025,000 in cash to its stockholders for 500 shares of its capital stock retired on that date pursuant to the proceedings above recited. On the books of the corporation, $975,000 of the amount distributed was charged to surplus and $50,000 to the capital stock account. The stock retired was immediately canceled. This distribution was on the basis of $2,050 per share and subsequently it was agreed between the stockholders and the defendant that

the value of the stock on March 1, 1913, was $2,050 per share and that no taxable income was determined as arising out of the retirement of the stock in 1929.

13. On February 12, 1929, and immediately after the payment of the cash dividend made on that date in the amount of $250,000.00 the remaining balance of earnings and profits accumulated by the Foster Lumber Company since February 28, 1913, was $155,793.17. The earnings and profits of that corporation for the period from February 12, 1929, to October 10, 1929, were $174,785.81.

14. The earnings and profits of the Foster Lumber Company on October 10, 1929, prior to the distribution of $1,025,000.00 on that date, which had been accumulated since February 28, 1913, were $330,578.98.

15. The accumulated earnings or profits of the Foster Lumber Company for the period from October 10, 1929, to February 11, 1930, and prior to the cash distribution of $225,000.00 on the latter date by that company were $82,758.17.

The court decided that plaintiffs were not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiffs, claiming that the decedent in her lifetime overpaid her taxes for the year 1930, bring this suit to recover the alleged overpayment, being $740.60 together with interest from March 12, 1931. There is no dispute as to the facts.

For the calendar year 1930 the decedent filed a return stating her taxable income to be $29,697.29 and paid the tax thereon. Included in decedent's reported income was the sum of $23,250 received from the Foster Lumber Company as dividends on 155 shares of stock of that company owned by her. This was out of a dividend of $225,000 declared on February 11, 1930.

Plaintiffs claim that $14,754.22 included in the dividend of $23,250 was paid by the company out of surplus accumulated prior to March 1, 1913, and hence was exempt from tax. The Commissioner of Internal Revenue rejected this

claim and the decedent having filed a claim for refund which was also denied, brought this suit.

The Foster Lumber Company was organized in 1896 and up to 1929 its capital stock consisted of 2,000 shares of the par value of $100 per share. On March 1, 1913, its earnings and surplus were in excess of $3,725,000. On October 10, 1929, having determined to retire 500 shares of the capital stock, the company paid in cash to its stockholders $1,025,000 and 500 shares of the stock were surrendered to the company for cancellation. Of this sum $975,000 was charged to surplus and $50,000 was charged to capital stock.

The plaintiffs rely on section 115 (b) of the revenue act of 1928 which provides that—

> For the purposes of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits.

It is contended that this provision is controlling here and that consequently the distribution made on October 10, 1929, must be treated as made out of earnings or profits accumulated since February 28, 1913, to the extent thereof. As the amount of such earnings remaining undistributed at that time was only $330,578.98, it is plain that if this rule is applied the distribution would more than absorb all of this amount leaving nothing to be carried over to the next year.

In the interval from October 10, 1929, to February 11, 1930, when $225,000 was distributed, the corporation accumulated $82,758.17 and plaintiffs claim that this was all which was distributed on the date last mentioned out of earnings and profits accumulated since February 28, 1913. If this is correct, the remainder of the dividend, $142,241.83, was not subject to income tax when it came into the hands of the stockholders and the Commissioner erred in holding to the contrary and in refusing to allow the decedent's claim for a proportionate reduction in her income tax for that year.

The defendant, on the other hand, contends that the distribution made in 1929 constituted an exception to the gen-

eral rule expressed in section 115 (b) and is covered by a provision in 115 (c) which reads as follows:

> In the case of amounts distributed in partial liquidation * * * the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits within the meaning of subsection (b) of this section for the purpose of determining the taxability of subsequent distributions by the corporation.

It will be seen that the ultimate issue between the parties is whether the distribution of 1929 was "properly chargeable to capital account."

In determining the question thus presented the nature of the distribution must first be considered.

Clearly the distribution was not a dividend, either in the special sense that the word is used in the statute as defined in section 115 (a), or in its meaning as generally used, which is somewhat broader. The definition set out in the statute was evidently inserted to make sure that there could be no claim that a distribution made out of profits was not a dividend. The distinction between a dividend and such a distribution as is made in the case before us is quite plain. When a dividend is made, the stockholder receives something but pays nothing. In the case at bar, the stockholder received money from the corporation but gave what may be considered as full value for what she received. Neither the stockholder nor the corporation had gained by the transaction. We think that if profits were distributed, as is now claimed by the plaintiffs, the stockholder would not have been required to pay for what she received. What the corporation turned over to the stockholders was the value of their stock which appears to be the same as on March 1, 1913. This is treated by the law as a basis of the determination of gain or loss to the stockholder in the transaction, and we think it is so treated on the ground that earnings or profits accumulated prior to that date constituted for tax purposes the capital of the taxpayer. When the stockholders obtained the March 1, 1913, value of their stock, it was the realization of capital, and was properly chargeable to capital account.

Opinion of the Court

A consideration of the purpose of section 115 (c) of the act of 1928 and the reports made by the committees of the House and Senate when it first became a part of the revenue law supports the view above expressed. As the law originally stood, the plan devised in the case before us could be carried out so that the earnings and profits accumulated since 1913 would be distributed tax free. The general provisions of 115 (b), which were in the former act, would have required the distribution to be treated as made out of earnings or profits accumulated after February 28, 1913, and the distribution would be properly chargeable to surplus and paid out of such profits with the result that the distribution made October 10, 1929, absorbed all of the earnings and profits to that date. Obviously this would enable the stockholders to escape taxation although they had received earnings and profits which had accumulated since February 28, 1913. To prevent this avoidance of taxes, what is now section 115 (c) of the revenue act of 1928 was inserted in the revenue act of 1924 as section 201 (c). This new provision stated an exception to section 115 (b), namely a case where the distribution was "properly chargeable to capital account." When the 1924 act was reported, the reports on the bill made by both the Senate and House Committees contained the following statement:

> The theory of liquidating dividends is extended to distributions in partial liquidation. If a corporation retires a portion of its capital stock, the transaction is treated, from the point of view of the stockholder, as a sale of his stock. If the corporation distributes an amount in partial retirement of its capital stock, the amount thereof is *to be considered as a return of capital*, and taxable only if, as, and to the extent that it exceeds the basis of the stock. [Italics ours.]

In the case before us, the corporation distributed an amount in partial retirement of its capital stock and, as stated in the report, this is "considered as a return of capital." Money paid out in making a return of capital is "properly chargeable to capital account." It is true that the reports presented the matter "from the point of view of the stockholder", but the principle is the same when applied to the corporation. The distribution came within the provisions of 115 (c), being properly chargeable to capital

Opinion of the Court

account, and consequently was not to be considered as a distribution of profits under 115 (b).

If the distribution of 1929 was charged to capital account, as it should be according to what we have held above, the profits which had accrued since 1913 and then on hand would not be depleted thereby. When the 1930 distribution was made, then, under the provisions of 115 (b), it would be paid out of these profits to the extent thereof. When the decedent received her share of these profits, the Commissioner rightly held that she was taxable thereon.

The petition must be dismissed and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

SUPPLEMENTAL OPINION ON MOTION FOR NEW TRIAL

GREEN, *Judge*, delivered the opinion of the court:

In the argument in support of the motion for new trial it is strenuously insisted that the decision of the court is contrary to the rule laid down in a decision by the Supreme Court, one made by the Circuit Court of Appeals for the Second Circuit, and also another by the Board of Tax Appeals. As no reference was made to these cases in the original opinion, it is thought best to show why the court did not mention them.

Special reliance is placed upon the case of *Helvering* v. *Canfield*, 291 U. S. 163, and it will be admitted that the opinion in the case at bar is not in accord with some statements found in the opinion of the Supreme Court in that case, but the reason is plain. We have before us a different act imposing a different rule. The decision in the case just cited was made under the provisions of section 201 (b) of the revenue act of 1921 [1]; the holding in the case at bar

[1] The changes made in the revenue acts have led to some confusion in applying the statutes. The 1918 act contained a provision that "amounts distributed in the liquidation of a corporation shall be treated as payment in exchange for stock or shares." For some reason this provision was omitted in the 1921 act under which the *Canfield case* was decided; but it was restored in the 1924 act with some amplification as shown in the quotation from that statute. It is still in force under a different section number. In the 1924 act the part material to the case under consideration was designated as section 201 (a), (b), and (c). In the 1928 act, it is marked section 115 (a), (b), and (c).

is based upon the special provision contained in the act of 1924 [201 (c)] which was inserted for the purpose of making an exception to the provisions of the law that controlled the *Canfield case*, *supra*. In fact it could have been inserted for no other purpose and is otherwise meaningless. Counsel quote from the opinion of the Supreme Court in the last named case the following:

> Nor is it important that the accumulated profits, as they stood on March 1, 1913, constituted capital of the company as distinguished from the gains or income which the company subsequently realized.

Clearly it was not as the statute then stood, but it is now in such cases as the one we have before us. Section 201 (c) of the 1924 act provided that—

> (c) Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. * * * In the case of amounts distributed in partial liquidation * * * the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits within the meaning of subdivision (b) of this section for the purpose of determining the taxability of subsequent distributions by the corporation.

In the case at bar it is conceded that there was a distribution in partial liquidation, which the statute says "shall be treated as in part or full payment in exchange for the stock", and further that if it is "properly chargeable to capital account" it shall not be considered as "within the meaning of subdivision (b)" upon which the plaintiffs rely.

In support of their argument that the distribution of 1929 was not "properly chargeable to capital account", counsel for plaintiffs quote further from the opinion of the Supreme Court—

> When a corporation continued in business after March 1, 1913, the dividends it later declared and paid to its stockholders, whether out of current earnings or from profits accumulated prior to that date, constituted

income to the stockholders, and not capital, and were taxable as income if the Congress saw fit to impose the tax.

But in the *Canfield case* from which this quotation was taken, the Supreme Court was applying the 1921 act to "dividends." In the instant case we must apply the 1924 statute to an "amount distributed in partial liquidation" which, like amounts distributed in complete liquidation, to the extent of the distribution must be "treated as in full payment in exchange for the stock." Payments for stock are chargeable to capital account.

The case of *John B. Stewart* v. *Commissioner*, 29 B. T. A. 809, also, in our opinion, has no application. It is necessarily taken out of the special provision above quoted by the fact that the Board held that the distribution then under discussion was not "a distribution in partial liquidation" but a dividend and controlled by subdivision (b) of section 115 of the act of 1928. The plaintiffs also cite the case of *Horrmann* v. *Commissioner*, 34 B. T. A. 1178, wherein it is said that " the 'capital account' referred to by the statute is not increased by the issuance of a nontaxable stock dividend, but comprises only the paid-in capital." We are not disposed to agree with the construction which counsel place upon this statement but it is immaterial because the instant case does not involve any stock dividend and the Supreme Court has held that stock dividends are not a distribution. The case last cited is quite complicated in its facts and to review it fully would unduly extend this opinion. We agree with the holding made in the opinion that "normally the redemption of stock is a return of capital", and also that "as an accounting matter the whole would be charged against capital", but are not disposed to agree as to all that is said in the opinion with reference to the meaning of the statute under discussion. The case of *Harter* v. *Helvering*, 79 Fed. (2d) 12, did not involve a "distribution in partial liquidation" and consequently what is said therein has no application here.

Opinion of the Court

The case of *Hellmich* v. *Hellman*,[2] 276 U. S. 233, is not cited by either party. Possibly this failure is due to the fact that the ultimate question in the case is not the one which is now before this court, but in the course of its opinion the court in effect ruled on the matter now in controversy. In this case it was held that—

> * * * the general definition of a dividend in § 201 (a) was not intended to apply to distributions made to stockholders in the liquidation of a corporation, but that it was intended that such distributions should be governed by § 201 (c), which, dealing specifically with such liquidation, provided that the amounts distributed should "be treated as payments in exchange for stock" * * *.

In Klein on Income Taxation, par. 10:18 (a), it is said that—

> Under this rule [as stated in *Hellmich* v. *Hellman*, *supra*] it does not matter that part of the liquidating dividend came from accumulated earnings. The transaction is treated in its entirety as a capital transaction.

Being a capital transaction, the payments made would be chargeable to capital account and under the statute could not be considered in "determining the taxability of subsequent distributions."

The Board of Tax Appeals on March 15, 1937, entered a memorandum opinion in the case of *Craig, Executor*, v. *Commissioner*, which involved the same facts and pertained to the same estate as the case at bar. The decision rendered was in accordance with the contentions of the plaintiffs made in the case now before this court and was contrary to the views which we have expressed above. As the reasoning upon which this opinion was based is not expressed, we can only say that we do not concur.

Our conclusion is that the motion for new trial must be overruled, and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

[2] This case was decided under the 1918 act. See note 1 for the provision therein with reference to amounts distributed in liquidation.

CHARLES H. HUBBARD v. THE UNITED STATES

[No. 42647. Decided December 7, 1936]

On the Proofs

Income tax; crediting of foreign tax against domestic tax; purpose of statutes.—The primary design of the provisions of the income tax laws permitting taxpayers to credit taxes paid or accrued to foreign countries during the taxable year against their domestic taxes was to mitigate the evils of double taxation, which results when the same income is taxed in both the foreign country and the United States.

Crediting foreign tax on salary against domestic tax.—Where the plaintiff, a citizen of the United States, resided in Great Britain and paid that country taxes on a salary received there which, not being a part of the net income upon which his taxes in the United States were computed, was exempt from taxation here, he was not entitled to have such foreign tax on his salary credited against his income taxes here.

The Reporter's statement of the case:

Mr. John L. McMaster for the plaintiff. *Tolbert, Ewen & Patterson* were on the brief.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a citizen of the United States and temporarily a resident of London, England. During the year 1927 plaintiff was married and living with his wife and had three children under the age of eighteen years who received their sole support from him.

2. On July 20, 1928, plaintiff filed his individual income tax return for the year 1927, on the cash receipts and disbursements basis, disclosing therein a net income of $153,-284.65 and an income tax of $29,529.14 against which plaintiff claimed a credit for foreign taxes accrued of $17,429.16, leaving a net tax $12,099.98 to be paid to the United States. Accompanying the tax return and filed therewith was a claim for credit on Form 1116 showing the amount of $43,047.85 as taxes accrued to Great Britain.

Said tax was on income also taxable in the United States. The balance of such foreign taxes not claimed as a credit amounting to $25,618.69 was deducted from said income of $153,284.65, leaving a net income after deduction of foreign taxes of $127,665.96, upon which plaintiff paid a tax of $12,099.98 to the Collector of Internal Revenue at Baltimore, Maryland, on July 20, 1928. Said tax has been covered into the Treasury of the United States.

3. Plaintiff's net taxable income for 1927 before deduction of taxes paid to foreign countries was and has been determined by the Commissioner of Internal Revenue to be the sum of $181,114.22, of which .540799, or $97,946.54, was derived from sources without the United States, and $83,-167.68 was derived from sources within the United States. Included in such net income were dividends on stocks of domestic corporations amounting to $38,646.89. All of said sum of $97,946.54, except $241.42, is dividends of foreign corporations. Of said sum, $78,843.22 was actually paid to plaintiff; the remainder, $19,103.31, represents income taxes appropriate to said dividends which was paid by such corporations to Great Britain.

In addition to the foregoing, plaintiff received in 1927 salary for personal services performed in Great Britain amounting to £33,402.10, equivalent to $163,004.20, and the Commissioner of Internal Revenue has determined that plaintiff was for more than six months during 1927 a *bona fide* nonresident of the United States within the meaning of Section 213 (b) (14) of the Revenue Act of 1926, and that such salary should not be included in gross income subject to American tax. No part of said salary was included in gross income in the tax return.

4. During the year 1927 taxes accrued against plaintiff to Great Britain upon his taxable income, other than said salary derived from Great Britain, in the amount of £8,916.04, equivalent to $43,439.98. This amount is decreased by $48.22 (the tax paid on bank interest and allowed by defendant for the year 1928), leaving $43,391.76. In addition thereto income taxes amounting to £6,450.1.5, equivalent to $31,476.35, and additional income tax known as supertax of £8,193.7.6, equivalent to $39,987.71, making a total of

$71,460.06, accrued to Great Britain upon plaintiff's salary for 1927.

5. On April 16, 1929, plaintiff duly filed a claim for the refund of $5,718.67 on account of income taxes paid for the year 1927, and thereafter filed amendments to said claim on May 30, 1930, and January 19, 1931. In the refund claim and the amendments thereto, the grounds upon which the overassessment and overpayments were claimed were stated to be that plaintiff's surtax was overstated, and that credit for foreign taxes was understated, and that plaintiff's income tax liability should be adjusted as follows:

COMPUTATION OF TENTATIVE TAX

Net income without deduction of foreign taxes		$181, 114. 22
Less dividends	$38, 646. 89	
Personal exemption	4, 700. 00	
		43, 346. 89
Balance subject to normal tax		$137, 767. 33
Tax		34, 551. 21
Less: Earned income credit		1. 13
Balance of tax		$34, 550. 08
Amount of tentative tax liability as a credit .540799 x $34,550.08		$18, 684. 65
British tax on salary applicable to credit		$71, 460. 06
Balance of foreign taxes deductible from gross income		$43, 391. 76

COMPUTATION OF TAX

Total income above	$181, 114. 22
Less foreign taxes deductible	43, 391. 76
Net income subject to surtax	$137, 722. 46
Less dividends and personal exemption	43, 346. 89
Balance subject to normal tax	$94, 375. 57
Normal tax on $4,000.00 at 1½%	60. 00
Normal tax on 4,000.00 at 3%	120. 00
Normal tax on 89,375.57 at 5%	4, 318. 78
$94,375.57	$4, 498. 78
Surtax on $137,722.46	19, 201. 49
Total tax	$23, 703. 27

Reporter's Statement of the Case

Less: Credit for foreign taxes	$18,684.65	
Earned income credit	1.13	
		$18,685.78
Net tax liability		$5,017.49

Attached to the refund claim and amendments thereto were claims for credit for foreign taxes accrued on Form 1116, in which, among other claims, it was claimed that the foreign taxes on plaintiff's salary should be first applied to the credit and that the other foreign taxes should be deducted from his gross income.

6. Thereafter, upon audit and review of plaintiff's income tax return and his tax liability for the year 1927, the Commissioner of Internal Revenue found and determined a deficiency tax against plaintiff for the year 1927 in the amount of $1,617.11, and by his letter dated February 26, 1931, notified plaintiff hereof.

By a letter dated February 26, 1931, the Commissioner of Internal Revenue notified plaintiff that said claims for refund would be rejected. On June 18, 1931, plaintiff paid the deficiency tax so assessed of $1,617.11, with interest thereon, amounting to $313.10, making a total payment of $1,930.21. The claims for refund were rejected on a schedule dated June 19, 1931, and plaintiff was notified thereof by letter of the same date.

7. On October 23, 1931, plaintiff filed a claim for the refund of said deficiency tax and interest thereon, in the amount of $1,930.21, for the year 1927. In his said claim for refund, plaintiff restated the grounds set forth in said prior refund claims, and requested that the Commissioner of Internal Revenue reopen said prior claims for refund and reconsider his action thereon.

Thereafter, the Commissioner of Internal Revenue did reopen and reconsider the claims for refund and redetermined plaintiff's tax liability and found an overassessment in favor of plaintiff for the year 1927 of $4,341.53, which overassessment so found, with interest thereon amounting to $478.60, was refunded to plaintiff by credit on income tax assessed against plaintiff for another year.

The Commissioner of Internal Revenue disallowed the balance of plaintiff's claims for refund on May 6, 1932.

In his final determination of plaintiff's income tax liability for the year 1927, the Commissioner of Internal Revenue determined the same as follows:

COMPUTATION OF TENTATIVE TAX

Total income from all sources (without deduction for foreign taxes)		$181, 114. 22
Less:		
Dividends	$38, 646. 89	
Personal exemption	4, 700. 00	
		43, 346. 89
Balance subject to normal tax		137, 767. 33
Normal tax at 1½% on $4,000.00		60. 00
Normal tax at 3% on $4,000.00		120. 00
Normal tax at 5% on $129,767.33		6, 488. 37
Surtax on $181,114.22		27, 882. 84
Total tax		34, 551. 21
Less: Earned income credit on $5,000.00 earned income		1. 13
Balance of tax		34, 550. 08
Total foreign tax		43, 439. 98
Less: Tax on bank interest allowed when paid in 1928		48. 22
Foreign taxes to be applied for 1927		43, 391. 76
United States tax, $34,550.08×.540799		[1] 18, 684. 65
Balance deduction from income		[2] 24, 707. 11

COMPUTATION OF TAX

Total income from all sources		$181, 114. 22
Less: Foreign tax deduction		24, 707. 11
Net income adjusted		156, 407. 11
Less:		
Dividends	$38, 648. 89	
Personal exemption	4, 700. 00	
		43, 346. 89
Balance subject to normal tax		113, 060. 22

[1] Credit.
[2] Deduction.

Opinion of the Court

Normal tax at 1½% on $4,000.00		$60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $105,060.22		5,253.01
Surtax on $156,407.11		22,941.43
Total tax		28,374.44
Less:		
Credit on $5,000.00 earned income	$1.13	
Foreign tax credit	18,684.65	
		18,685.78
Tax liability		9,688.66

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff, a citizen of the United States, was a temporary resident of the city of London, England, during the taxable year 1927. The plaintiff's federal income tax return for the year, filed on July 20, 1928, disclosed a net income of $153,284.65, arising from sources both within and without the United States, all of which was taxable in the United States. Claim for credit of $43,047.85 taxes accrued to Great Britain on the income arising in that country accompanied the return, of which amount $17,429.16 was claimed as a credit against the taxes shown to be due on the return, and the balance of $25,618.69 was taken as a deduction from income, leaving a tax liability of $12,099.98, which was paid by the plaintiff.

Subsequently, an additional assessment of $1,617.11 was made against plaintiff on the return, with interest thereon, amounting in all to $1,930.21, which was also paid.

The plaintiff's net taxable income for 1927, before deduction of foreign taxes, was determined by the Commissioner of Internal Revenue to be the sum of $181,114.22, of which .540799, or $97,946.54, was derived from sources without the United States and $83,167.68 was derived from sources within the United States. In computing the tax liability the Commissioner gave the plaintiff credit for the full amount of the foreign tax accruing to Great Britain on income arising in that country, $43,391.76, by the deduction of $24,707.11 from net income, and a credit of $18,684.65 against the tax itself.

Opinion of the Court

In addition to the income reported by plaintiff in his tax return for 1927, he received a salary for personal services performed in Great Britain during the year amounting to $163,004.20, upon which a tax accrued to Great Britain in the amount of $71,460.06. Under section 213 (b) (14) of the Revenue Act of 1926 [1] the amount of this salary was exempt from taxation and for that reason was not included by him in the gross income reported, nor was any claim made by him at the time for credit in respect to the foreign taxes paid on such salary. Subsequently, however, in a claim for refund, as amended, plaintiff sought to obtain a benefit of such taxes in the computation of the foreign tax credit to which he was entitled. It was urged that the foreign taxes on the plaintiff's salary should be first applied to the credit provided in section 222 (a) (1) (5) of the Revenue Act of 1926, and that the other foreign taxes paid by plaintiff should be deducted from his gross income under section 214 (a) (3) of the same act. The Commissioner of Internal Revenue disallowed this part of the plaintiff's claim for refund and ruled that the taxes paid to a foreign country by a citizen of the United States upon income excluded from gross income under section 213 (b) (14), might not be claimed as a credit under section 222, nor as a deduction under section 214 of the Revenue Act of 1926.

The plaintiff in this suit renews the contentions made by him before the Commissioner in the disallowed claim for refund, and says that the questions involved are:

(1) Is an American citizen residing abroad, whose income includes salary earned abroad which is exempt from the

[1] "Sec. 213. For the purposes of this title, except as otherwise provided in Section 233.

* * * * * * *

(b) The term 'gross income' does not include the following items, which shall be exempt from taxation under this title.

* * * * * * *

(14) In the case of an individual citizen of the United States, a bona fide non-resident of the United States for more than six months during the taxable year, amounts received from sources without the United States if such amounts constitute earned income as defined in section 209; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this paragraph."

"Sec. 209. (a) For the purposes of this section—

(1) The term 'earned income' means wages, salaries, * * * received as compensation for personal services actually rendered * * *."

United States tax, entitled to credit for the foreign taxes on the exempt salary if he has other taxable foreign income which may be used as a basis for the computation of the credit?

(2) If so, may he require that the foreign income taxes on the exempt salary, which are not allowable deductions, be applied to the credit and that the foreign income taxes on the foreign taxable income be deducted from his gross income?

The provisions of the Revenue Act of 1926 relied upon by plaintiff are:

> SEC. 214. (a) In computing net income there shall be allowed as deductions:
>
> * * * * *
>
> (3) Taxes paid or accrued within the taxable year except * * *. (B) so much of the income, war-profits, and excess-profits taxes, imposed by the authority of any foreign country * * * as is allowed as a credit under section 222 * * *.
>
> SEC. 222. (a) The tax computed under Parts I and II of this title shall be credited with:
>
> (1) In the case of a citizen of the United States the amount of any income, war-profits, and excess profits taxes paid or accrued during the taxable year to any foreign country * * *.
>
> * * * * *
>
> (5) The above credits shall not be allowed in the case of a citizen entitled to the benefits of section 262; and in no other case shall the amount of credit taken under this subdivision exceed the same proportion of the tax (computed on the basis of the tax-payer's net income without the deduction of any income, war-profits, or excess-profits tax any part of which may be allowed to him as a credit by this section), against which such credit is taken, which the taxpayer's net income (computed without the deduction of any such income, war-profits, or excess-profits tax) from sources without the United States bears to his entire net income (computed without such deduction) for the same taxable year.

The primary design of the provisions carried in the various revenue acts permitting taxpayers to credit taxes paid or accrued to foreign countries during the taxable year against their domestic taxes was to mitigate the evils of

double taxation. *Burnet* v. *Chicago Portrait Company*, 285 U. S. 1. Double taxation exists only when the same income is taxed both in the foreign country and in the United States. Plaintiff's salary in Great Britain on which a tax of $71,460.06 accrued to that country was exempt from taxation in the United States and constituted no part of the net income upon which his taxes in this country were computed. He paid taxes upon the salary in Great Britain alone, hence there is no case of double taxation presented. The plaintiff, as we have seen, has already been given the full credit he is entitled to receive in the way of credit against his domestic taxes of foreign taxes paid or accrued to Great Britain on all income arising in that country upon which taxes were also imposed in this country.

The action of the Commisisoner of Internal Revenue in disallowing plaintiff's claim for refund was correct. The plaintiff is not entitled to recover and the petition will be dismissed. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

CHARLES H. HUBBARD v. THE UNITED STATES

[No. 42648. Decided December 7, 1936]

On the Proofs

Income tax; credit for foreign tax. See similar case of plaintiff, *ante*, page 205.

The Reporter's statement of the case:

Mr. John L. McMaster for the plaintiff. *Tolbert, Ewen & Patterson* were on the brief.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a citizen of the United States and temporarily a resident of London, England. During the year

1928 plaintiff was married and living with his wife and had three children under the age of eighteen years who received their sole support from him.

2. On May 7, 1929, plaintiff filed his individual income tax return for the year 1928 on the cash receipts and disbursements basis, disclosing therein net income of $308,697.60, and an income tax of $65,737.19, against which plaintiff claimed a credit for foreign taxes paid of $67,673.86, leaving no tax to be paid to the United States. Accompanying said tax return, and filed therewith, was a claim for credit on Form 1116 showing the amount of $142,758.73 as taxes accrued to Great Britain. The balance of such foreign tax not taken as a credit, in the amount of $75,084.87, was deducted from income.

Included in the net income reported in said return was the sum of $178,622.60, salary received by plaintiff in 1928 for personal services performed in Great Britain, and income and supertax amounting to $80,363.54 accrued thereon to Great Britain were included in said total amount of foreign taxes claimed by plaintiff as a credit against domestic taxes and/or a deduction from taxable income. The Commissioner of Internal Revenue has determined that plaintiff was for more than six months during 1928 a *bona fide* non-resident of the United States within the meaning of Section 116 (a) of the Revenue Act of 1928, and that such salary should not be included in gross income subject to tax.

3. Plaintiff's net taxable income for 1928, excluding said salary, and before deduction of taxes paid to foreign countries, was and has been determined by the Commissioner of Internal Revenue to be the sum of $205,319.87, of which .60574, or $124,371.48, was derived from sources without the United States, and $80,948.39 was derived from sources within the United States. Included in such net income were dividends on stocks of domestic corporations amounting to $44,219.26. All of said sum of $124,371.48, except $1,725.00, is dividends of foreign corporations. Of said sum $98,117.18 was actually paid to plaintiff; the remainder, $24,529.30, represents income taxes appropriate to said dividends which was paid by such corporations to Great Britain.

Reporter's Statement of the Case

4. During the year 1928 income taxes accrued to Great Britain on plaintiff's income amounting to $137,564.10, of which $80,363.54 accrued on the salary and $57,200.56 accrued on the other income of plaintiff. In plaintiff's amended claim for credit for foreign taxes he asked that if not allowed to include said salary in gross income that the foreign taxes accrued thereon be first applied to the credit allowable for taxes paid to foreign countries, and that the other foreign taxes accrued be deducted from gross income.

5. Thereafter, upon audit and review of plaintiff's income tax return and his tax liability for the year 1928, the Commissioner of Internal Revenue found and determined a deficiency tax against plaintiff for the year 1928 in the amount of $7,703.86, and by his letter dated February 26, 1931, notified plaintiff thereof. In his final determination of plaintiff's income tax liability for the year 1928, as set forth by the letter of February 26, 1931, the Commissioner of Internal Revenue determined the same as follows:

Net income without deduction of foreign taxes		$205, 319. 87
Less: Amount of foreign taxes deductible		32, 775. 38
Net income		$172, 544. 49
Less:		
Dividends	$44, 219. 26	
Personal exemption and exemption for dependents	4, 700. 00	
		48, 919. 26
Balance subject to normal tax		$123, 625. 23
Normal tax	$5, 961. 26	
Surtax	26, 168. 90	
Total tax		32, 130. 16
Less:		
Earned income	$1. 12	
Credit for tax paid to foreign country	24, 425. 18	
		24, 426. 30
Tax liability		$7, 703. 86
Tax previously assessed		0
Deficiency		7, 703. 86

The Commissioner by said letter determined the credit and deduction allowable for taxes paid to foreign countries, as follows:

1. Total income without deduction for foreign taxes		$205, 319. 87
2. Net income from foreign sources		124, 371. 48
3. Ratio of total income to foreign income		. 60574
4. Total taxes accrued to foreign countries	$137, 564. 10	
Less amount thereof accrued on salary	80, 363. 54	
Remainder available for credit and deduction		57, 200. 56
5. United States tax on total income		40, 322. 88
6. Proportion of foreign taxes allowable as a credit, $40,322.88, multiplied by .60574		24, 425. 18
7. Balance of foreign taxes allowable as a deduction from gross income		32, 775. 38

The Commissioner thereafter assessed a deficiency tax against plaintiff of $7,703.86, which plaintiff paid to the Collector of Internal Revenue on June 18, 1931, together with interest thereon in the amount of $1,029.36, making a total payment of $8,733.22. Said amount has been covered into the Treasury of the United States.

6. On October 28, 1931, plaintiff duly filed a claim for refund of $8,733.22 on account of said income tax paid for the year 1928. In the refund claim, the grounds upon which the overassessment and overpayments were claimed were stated to be the erroneous refusal of the Commissioner of Internal Revenue to allow credit for foreign taxes accruing on plaintiff's salary, and his refusal and failure to allow deductions of the foreign taxes on other income in full from gross income, and in such claim plaintiff asked that his tax liability be determined by the allowance of such credit and such deduction, and claimed that his income tax liability for said year should be adjusted as follows:

Net income without deduction of foreign taxes	$205, 319. 87
Less foreign taxes allowable as a deduction	57, 200. 56
Net income adjusted	148, 119. 31
Less: dividends and exemptions	48, 919. 26
Balance subject to normal tax	99, 200. 05
Normal tax on $8,000	180. 00
Normal tax on $91,200.05 at 5%	4, 560. 00
Surtax on $148,119.31	21, 283. 86
Total Tax	26, 023. 86

Syllabus

Less:		
Earned income credit	$1.12	
Credit for taxes paid to foreign countries	24,425.18	
		$24,426.30
Tax liability		1,597.56
Tax assessed		7,703.86
Overassessment		6,106.30
Interest paid thereon		845.72
Overpayment		6,952.02

7. By letter dated April 15, 1932, the Commissioner notified the claimant that his claim for refund would be disallowed and rejected. The claim for refund was disallowed by the Commissioner on a schedule dated May 6, 1932.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The facts in this case are precisely the same as those presented in *Charles H. Hubbard* v. *United States*, No. 42647, decided this date, except that a different taxable year is involved. A discussion of the facts and law of the case is therefore unnecessary, and, following our decision in that case, it is held the plaintiff is not entitled to recover.

The petition is dismissed. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

CARLO DE LUCA v. THE UNITED STATES

[No. 42831. Decided December 7, 1936]

On the Proofs

Eminent domain; requisition of shipbuilding contracts; just compensation.—Just compensation for private property taken by the Government for public use is the value of the property at the time of the taking when payment is made contemporaneous with the taking; and where compensation is not made

Reporter's Statement of the Case

until a later time, the owner is entitled to such addition to this value as will produce the full equivalent of the value paid contemporaneously with the taking, and interest at a proper rate during the time payment was delayed is a good measure of such addition.

Same; fair market value as just compensation.—Where private property taken for public use had an established market value at the time of the taking, the price current in such market will be regarded as its fair market value, and likewise the measure of just compensation for the property, at the time taken.

The Reporter's statement of the case:

Mr. James J. Lenihan for the plaintiff. *Mr. Martin C. Ansorge* was on the brief.

Mr. Herbert A. Bergson, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Arthur Cobb* was on the brief.

The court made special findings of fact as follows:

1. Carlo de Luca is and was at the times here involved a citizen of the Kingdom of Italy, resident of Naples, Italy, and engaged in the marine shipping business.

2. Under and by virtue of the laws of Italy citizens of the United States are accorded the right to prosecute claims against the Kingdom of Italy in its courts.

3. Under the provisions of article XXIII of the treaty of commerce and navigation between the United States of America and His Majesty the King of Italy, duly proclaimed November 23, 1871, and now in full force and effect, the citizens of the United States and the subjects of the Kingdom of Italy are accorded free access to the courts of the respective Governments to maintain and defend their rights without any conditions, restrictions, or taxes other than such as are imposed upon the natives.

4. This action was commenced by the filing of the petition herein on October 20, 1934, pursuant to an act of Congress approved June 26, 1934, entitled "Private No. 396", 73d Congress, S. 2806, an act "To confer jurisdiction on the Court of Claims to hear and determine the claim of Carlo de Luca." This act provides:

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That the Court of Claims of the United States be, and it is hereby, given jurisdiction to hear and determine the claim of Carlo de Luca, and to award him just compensation for losses and damages, if any, which he may have suffered through action of the United States Shipping Board Emergency Fleet Corporation in commandeering or requisitioning two certain contracts dated June 25, 1917, which the said Carlo de Luca owned and which he had with the Standard Shipbuilding Corporation of New York for the construction and delivery of two certain ships designated as "hulls 12 and 13"; and to enter decree or judgment against the United States for such just compensation, if any, notwithstanding the bars or defenses of any alleged settlement or adjustment heretofore made or of res judicata, lapse of time, laches, or any statute of limitation: *Provided, however*, That the United States shall be given credit for any sum heretofore paid the said Carlo de Luca by reason of said action of the United States Shipping Board and/or the United States Shipping Board Emergency Fleet Corporation.

SEC. 2. Such claim may, under section 1 of this Act, be instituted at any time within four months from the approval of this Act. Proceedings in any suit brought in the Court of Claims under this Act, appeals therefrom, and payment of any judgment therein shall be had as in the case of claims over which such court has jurisdiction under section 145 of the Judicial Code, as amended.

5. On June 25, 1917, plaintiff entered into two contracts in writing with the Standard Shipbuilding Corporation, a corporation duly organized and existing under the laws of the State of New York, owning and operating a shipyard at Shooters Island, State of New York, in and by which the Standard Shipbuilding Corporation agreed to build at its yard for the plaintiff, two single-screw, 'tween deck, steel cargo steamships of approximately 7,300 tons deadweight capacity each, at an agreed price of $175 for each ton of dead-weight capacity, making the price of $1,277,500 for each ship, or $2,555,000 for both ships, payable in certain installments, as set forth in said contracts. The contracts also provided that the vessels, or any part thereof, and all materials purchased and delivered to the yards of the shipbuilder for their construction, became

the property of the purchaser in so far as he had made payment under the contracts. The contracts further provided that in case the shipbuilder did not proceed with reasonable dispatch in the building of the vessels the purchaser might enter into the yard of the shipbuilder, employ any number of workmen, and use and employ the necessary machinery, engines, and tools of the shipbuilder, purchase materials, proceed with the finishing of the vessels, pay the wages of the workmen, and pay for such materials out of the balance remaining unpaid of the purchase price, and in case the same was insufficient for the purpose, the shipbuilder would pay and make good the deficiency. The contracts further provided for a first payment of $191,625 under each of said contracts, amounting to $383,250, being 15 per cent of the purchase price, and that the shipbuilder should give to the plaintiff an indemnity bond in a sum equal to the amount of the first payment, to be held by the plaintiff as security for the faithful performance of the contract by the shipbuilder. After the execution of these contracts the Standard Shipbuilding Corporation prepared for the construction of said vessels, designated as hulls Nos. 12 and 13. The contracts were identical except the vessels therein were respectively designated as hulls 12 and 13, and hull no. 12 was to be completed on May 31, 1918, and hull no. 13, June 30, 1918.

6. Prior to August 3, 1917, the date of the issuance of the requisition orders hereinafter set forth, there had been paid by plaintiff to the Standard Shipbuilding Corporation, on account of the construction of the vessels, the first installments amounting to the sum of $383,250; and after said date and prior to August 16, 1917, the date of the notice of requisition sent to plaintiff as set out in finding 11, there was likewise paid the second installment amounting to $178,850. There was thus paid by plaintiff to the Standard Shipbuilding Corporation on account of the construction of hulls the total sum of $562,100.

On July 23, 1917, the Globe Indemnity Co., as surety for the Standard Shipbuilding Corporation, issued two bonds, numbered 90151 and 90152, respectively, each in the amount of $191,625, in favor of the plaintiff, conditioned upon the

construction and delivery of the vessels by the shipbuilder in accordance with the terms of the contracts. There still remained on August 16, 1917, to be paid ten installments aggregating $1,992,900.

Plaintiff also expended for brokerage commissions, interest, transfer of moneys, and incidentals in connection with financing, for general expenses, cables, travel, etc., and for engineering and legal services in connection with the formulation of and entry into the contracts, the sum of $270,349.18.

7. On July 11, 1917, the President, by virtue of the authority vested in him by act of Congress of June 15, 1917, by an Executive order delegated the powers conferred upon him by the said act to the United States Shipping Board Emergency Fleet Corporation. Under authority so conferred upon it, while the work provided to be done under the contracts of June 25, 1917, between plaintiff and the Standard Shipbuilding Corporation was in progress, the United States Shipping Board Emergency Fleet Corporation on August 3, 1917, sent the Standard Shipbuilding Corporation the following telegram and the following letter, which were duly received:

Standard Shipbuilding Corporation,
Shooters Island, N. Y.:

By virtue of an act approved June 15, 1917, and authority delegated to the Emergency Fleet Corporation by Executive order of July 11, 1917, all power-driven cargo-carrying and passenger vessels above twenty-five hundred tons dead-weight capacity under construction in your yards, and materials, machinery, equipment, and outfit thereto pertaining are hereby requisitioned by the United States and will be completed with all practicable dispatch. Letter follows.

W. L. Capps, *General Manager.*

[Letter]

United States Shipping Board,
Emergency Fleet Corporation,
Washington.

Standard Shipbuilding Corporation,
Shooters Island, N. Y.:

By virtue of an act of Congress approved June 15, 1917, entitled "Act making appropriations for the Mili-

tary and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes", and by authority delegated to the United States Shipping Board Emergency Fleet Corporation under Executive order of the President, dated July 11, 1917, all power-driven, cargo-carrying, and passenger ships, above 2,500 tons d. w. capacity, under construction in your yard and certain materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.

On behalf of the United States, by virtue of said act and said order, you are hereby required to complete the construction of said requisitioned ships under construction and will prosecute such work with all practicable dispatch.

The compensation to be paid will be determined hereafter and will include ships, material, and contracts requisitioned.

You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of contracts and all supplemental agreements in relation thereto and full particulars as to owners, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts.

You will report immediately whether any additional contracts are under consideration and their character and extent and will not enter into any additional contracts or commitments with respect to merchant tonnage without express authority from this corporation.

(Signed) W. L. CAPPS,
General Manager, United States Shipping Board Emergency Fleet Corporation.

WASHINGTON, D. C.,
August 3, 1917.

Among the vessels described above were included hulls Nos. 12 and 13 which the Standard Shipbuilding Corporation was building under these contracts.

8. On August 13, 1917, Eads Johnson, the district officer of the United States Shipping Board Emergency Fleet Corporation at New York, sent Admiral W. L. Capps, the

general manager, the United States Shipping Board Emergency Fleet Corporation, Washington, D. C., the following letter:

EADS JOHNSON,
UNITED STATES SHIPPING BOARD,
EMERGENCY FLEET CORPORATION,
2ND DISTRICT, 115 BROADWAY,
New York City, August 13, 1917.

ADMIRAL W. L. CAPPS,
General Manager, Emergency Fleet Corporation,
Washington, D. C.

Standard Shipbuilding Corporation.

DEAR SIR: Herewith copies of contracts, plans, and specifications for thirteen (13) 7,300-ton deadweight capacity steel cargo vessels, their standard design, each contract covering one vessel only. Their letter dated August 8th, marked "A", attached, states that these are true and correct copies. There were found, however, in the case of Nos. 6 and 7, some discrepancies, but their letter of August 10th, marked "B", two sheets, clears up the difference between the original and copies.

2. Copies of contracts 6 and 7, and letter furnished me by the Russian Volunteer Fleet, are also enclosed, wherein there is some difference between these and the copies furnished. These are marked "C", "C–1", "C–2", and "C–3."

3. Report of contracts on hand, so far as the financial status is concerned, is enclosed, marked "D."

4. Supplementing the information which they have furnished, I have made a personal inspection, and find contracts in the following conditions:

Hull No. 1: Has been launched. Schedule trial trip Sept. 1st to 15th. Present stage of completion hull steelwork, 90%. Carpenter work, 75%. Joiner work, 15%. Main engines in ship, 95% completed. Main boilers in ship, 90% complete. Piping, 30% complete, Being held up on account of valves and fittings not delivered.

NOTE.—I think the trial date will have to be extended from 3 to 6 weeks beyond dates they give, from present stage of the work.

Hull No. 2: Still on stocks. Launching date given, September 10th. No delivery date. Hull now 85% completed.

NOTE.—Will require continuous work to meet launching date. Would name at least two weeks' additional time necessary.

Reporter's Statement of the Case

Main engines are very nearly completed and could be made ready to install in ship in ten (10) days' time. Boilers, 43% completed.

Hull No. 3: Hull about 55% completed. Engines, 75% completed, in shop. Boiler, 15% completed.

Hull No. 4: Keel and keelson laid and 75% of bottom shell in place. No frames up. Engines, 65% completed, in shop, awaiting forgings for connecting rods. Boilers, all material at plant, not worked.

Hull No. 5: 90% of keel laid. 40% bottom shell plates in place. Start made on engine bedplate. Boiler, all material at plant, not worked.

Hull No. 6: Nothing done. Material in yard.

Practically all material, including auxiliaries, with exception of mast and spars, has been delivered for all six (6) vessels.

Report of material attached (marked "F").

They have also received contract for two mine sweepers, for the United States Navy, and the keel blocks are now ready for keels.

In accordance with instructions received from Mr. Fuller on Saturday, I sent my district auditor, with accountant, to the plant, and the result of his findings is on attached sheet (marked "E").

I am also attaching copy of letter which I have delivered by hand, on Saturday, in accordance with Mr. Fuller's instruction, marked "G." Full particulars as to vessels incorporated in the specifications.

Further particulars have been furnished by my letters of August 9th and August 10th, which are in Mr. Fuller's file, which he left with me on Saturday, and which I am returning under separate cover.

Mr. Larkin, of the firm of Jolin, Larkin and Rathbone, attorneys for the Standard Shipbuilding Corporation, called this afternoon and commented on the fact that if they followed instructions they could not fulfill their contracts for the Navy Department, and suggested that he would very much like to have an interview with Admiral Capps to get the matter finally straightened out, as he was not entirely clear as to just how far the corporation intended to exercise their power and it was necessary for him to know it. I advised Mr. Fuller, by phone, and Mr. Larkin will wire when he will be in Washington.

Respectfully,

(Sgd.) EADS JOHNSON,
District Officer.

9. On August 28, 1917, the Standard Shipbuilding Corporation received from the United States Shipping Board Emergency Fleet Corporation the following letter:

United States Shipping Board,
Emergency Fleet Corporation,
Washington, August 16, 1917.

Standard Shipbuilding Corporation,
Shooters Island, N. Y.

Gentlemen: Referring to the general order under date of August 3, requisitioning ships over 2,500 tons' dead weight capacity now under construction in your yard, under the order you are required to immediately furnish general plans and detailed specifications of the ships requisitioned, copies of contracts and supplemental agreements in relation thereto, and other particulars as to owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation. In addition, please state under what flag or nationality contemplated by the original contract.

Please report at once on ships nearing completion and in every case give the estimated date of completion.

The Corporation requests that you make for each requisitioned vessel building by you suggestions—

(*a*) For the omission of such features as have been provided for convenience in special trades;

(*b*) For changes that will expedite placing the vessel in service;

(*c*) For changes that will insure the safety of the vessel;

(*d*) For omission or changes that will reduce the cost without loss of efficiency for overseas-carrying purposes.

Suggestion is also invited in case the vessels are built for a special trade as to what cargoes they are suitable for and as to what modifications could be readily made so as to make the vessels suitable for general cargoes.

Items marked (x) must be carried or provided on every ship.

Estimates of cost of changes to be submitted through district officer.

The following items may be considered in the class of omissions:

1. *Cargo ports.*—In case of ships where cargo ports are intended, they should be omitted if the work is not

too far advanced, and shell openings plated in. If the ports are already out, same are to be permanently fastened and reinforced.

2. *Special cargo-handling equipment.*—Where special cargo-handling equipment is contemplated, provided the work is not too far advanced, same should be eliminated. The general requirements for cargo-handling gear would be two booms to each hatch, and where a third or fourth boom has been contemplated same can be omitted, together with its gear. In the case of derrick posts, as usually fitted at no. 3 hatch provided with one boom, this arrangement should remain.

3. *Excessive number of ventilators to cargo holds and 'tween decks.*—Where cargo ventilators are in excess of two ventilators at each end of each hold and 'tween decks, same can be dispensed with. In cases where ventilators are extended up in the walls to clear deck load, this arrangement should remain.

4. *Bulwark shutters abreast of hatches.*—Where bulwark shutters are contemplated abreast of hatches, provided the work has not advanced so far as to make it less difficult to fit shutters already cut than to omit them, they should be omitted and bulwarks closed in solid.

5. *Trucking door in 'tween-deck bulkheads.*—In all cases hinged water-tight doors in 'tween-deck bulkheads, except where necessary for cargo access, as in the case of 'tween-deck bulkheads at forward and aft end of machinery space, the door openings to be plated in solid; or if the doors are already out, same to be permanently fitted and reinforced.

6. Where oil is not carried in double bottom, the cargo ceiling on tank top, except under hatches, may be eliminated.

For the intended overseas service, in view of the military requirements needed, it is desired for all ships—this, however, subject to the advanced stage of construction, also in cases of ships nearing completion—that the following additions be made:

1. Additional W. T. transverse bulkheads to be fitted and present intermediate W. T. bulkheads extended up to upper deck with a view to obtaining a two-compartment ship as far as practicable—that is, two compartments may be bilged or flooded and the ship remain afloat. In cases of bulk oil ships having wing trunkway at upper deck running fore and aft W. T. bulkheads to be fitted that the upper deck may become the bulkhead deck.

2. Valves or other means fitted on bilge and drainage piping for the purpose of preventing flooding communication from one compartment.

3. It is desired to install, in cases of ships wherever practicable, subject, however, to the advanced stage of work, an ice machine and cold-storage rooms. In usual cargo ships the capacity of ice machine would be one ton, and possibly in larger-size ships two tons' capacity and preferably of the direct expansion ammonia type. The CO_2 system and other makes of ice machines will be considered. No ice making is intended, but a scuttle butt or other means to be provided for cold drinking water for the crew, having faucet outlet in engine room and in galley or pantry.

For ships where it is not practicable to install an ice machine and cold-storage system, for want of space and location, and due to the advanced stage of the work, a large ice house should be provided for a sufficient capacity for storage based on the number of crew to be provisioned for a round trip to Europe, and for, say, five days in port.

4. U. S. Steam Board Inspection boat inspection requirements for service in the war zone to be provided with davits and other boat equipment to meet law.

5. Accommodations for gun crew to be provided for, consisting of room in vicinity of officers' quarters for lieutenant and an additional room for two gunners and further quarters for fifteen gun crew with berths, outfit, and furnishings similar to firemen's or sailors' quarters, and the gun crew quarters provided for as separate quarters for either sailors or firemen.

6. Where practicable a searchlight of 18-inch size to be installed. In case, however, where searchlights of smaller size are already ordered or have been received. and it is not possible to obtain and substitute an 18-inch searchlight before the time of completion of the ship, the smaller size searchlight to be installed as originally contemplated. In cases where no searchlight is contemplated, every effort on your part is to be exercised to obtain and install a searchlight.

7. U. S. inspection requirements for crew's quarters, life-saving equipment, etc., to be arranged for in cases of ships contracted for under foreign flags, as far as it is practicable to work same out without undue interference with the advanced stages of the work. In cases where it is not practicable to effect these changes you will please advise regarding the situation.

8. In cases of ships where the work has not advanced too far to make the change impracticable, for the purpose of lessening visibility, the usual mast is to be dispensed with, twin-arrangement low derrick posts to be fitted, arranged to hinge down or telescope. A light-built single mast to be fitted aft of smokestack, fitted with housing topmast which will carry the wireless. This must be for height of wireless for ships under 5,000 tons, approximately 80 feet; for ships 5,000 tons and over approximately 95 feet above the deep load line. To meet this requirement for wireless, a light-built steel mast to house may be fitted on forward side of smokestack and stack reinforced. In cases with ships where machinery is placed aft, a separate mast with housing topmast to be fitted amidships, or the housing extension provided at derrick post.

9. In cases where forced draft is fitted to the boilers the smokestack is to be as low as consistent, and further consideration is to be given to the possibility of providing a telescope smokestack, in which case a separate mast for wireless will be fitted.

10. War paint colors will be used for the final painting of the vessels, including the colors for the superstructure, stack, masts, etc., to eliminate visibility to the greatest extent possible.

11. Accommodations to be provided for the two wireless operators and in addition a separate adjoining room for operating the wireless. The corporation will supply and arrange for installing the wireless outfit.

For vessels under 5,000 tons dead-weight capacity a 1 kw. radio outfit will be used, having a normal radius of 100 to 150 miles; vessels 5,000 tons and over 2 kw. radio sets having a normal radius of 300 to 400 miles.

12. Gun foundations and magazines and gear for handling same. One gun forward and one gun aft, unless otherwise directed. The procedure in this matter, unless later directed, 'is that you address a request to the Chief of Naval Operations, Navy Department, Washington, D. C., stating the name of the ship, yard, number, size, tonnage, and location. The Chief of Naval Operations then directs the nearest board of naval officers to examine the ship and report at once as to what caliber and number of guns it can carry. Copies of this report are then forwarded to the Bureau of Ordnance, which furnishes the guns, mounts, and accessories, together with ammunition, to the Bureau of Construction and Repair, which sees that the decks are properly strengthened to withstand the shock of the

gunfire, and to the Bureau of Navigation, which provides the officers, petty officers, and seamen for the armed guard.

13. Bunker oil and store capacity for an 8,000-mile cruising radius at vessel's designated speed and load.

In case of vessels originally for foreign owners, which were not intended to meet U. S. inspection requirements with respect to crew accommodations, life-saving equipment, and other matters, and which are nearing completion, and which are advanced to such an extent that it is not practical to make changes, these changes may be omitted when receiving advices from you as to the exact situation. In general, however, it is intended that these vessels, wherever practicable, shall pass the U. S. Steam Board Inspection rules and laws.

With regard to additional transverse bulkheads and extending up present bulkheads, this also is conditioned to the stage of the work in case of each individual vessel.

With regard to changing masts and fitting twin derrick posts in cases where work on originally intended steel masts has been materially advanced, or where the making of these changes may delay progress of the work, the changes will not be made. You will please give information and explain the situation with respect to each individual vessel.

For the purpose that you may make arrangements and make investigations in cooperation with the corporation, the foregoing general requirements are desired, which will be supplemented in detail upon receipt of plans and specifications from you and by further communication or personal direction at your yard.

Very truly yours,

(Sgd.) W. L. CAPPS,
General Manager.

10. On August 16, 1917, the United States Shipping Board sent to its district officer, New York City, Eads Johnson, the following letter, a copy of which Johnson sent to the Standard Shipbuilding Corporation:

UNITED STATES SHIPPING BOARD,
EMERGENCY FLEET CORPORATION,
Washington, August 16, 1917.

Mr. EADS JOHNSON,
115 Broadway, New York City.

DEAR SIR: Herewith you will find a copy of the corporation's letter, in duplicate, of this date, relating to

such vessels building by Standard Shipbuilding Company in your district.

You will immediately notify the shipbuilding company that you are instructed to take charge, for the corporation, of the completion of these vessels, and you are authorized hereby to take over into the employ of the corporation, temporarily, the owner's local inspecting officers at the present rates of compensation, so far as they can comply with existing instructions and those hereafter issued in regard to citizenship, being careful that they take the usual oath of office.

Report promptly the name, compensation, the date of taking the oath, and the former employers of those whom you take over.

You will please forward, without delay, the usual certificates for payments which have become due since the date of requisitioning or may become due under the contract after that date, so far as practicable, certified by the former local inspector as well as yourself. These payments to the shipbuilder for the present must not exceed the actual cost of the contractor's outlay for labor, materials received since the last payment plus the approved overhead expense, nor must the payment so determined exceed the contract payment accrued.

Final action of the corporation regarding the substance and purpose of the contract, but this decision can not be determined until the corporation can investigate the facts and terminology of each contract to assure proper protection of the Government.

You will please furnish to the shipbuilder a copy of this letter and one copy of the enclosure, and you will request the shipbuilder to furnish you without delay, for transmission to the corporation, a statement in detail of such payments received on account of each contract prior to August 3rd, the date of the requisitioning.

Very truly yours,

(Sgd.) W. L. Capps,
General Manager.

11. Enclosed in the letter of August 16, 1917, set out in finding 10, were copies of the following letter and the enclosure therein referred to as enclosure A, both of which the United States Shipping Board Emergency Fleet Corporation sent to plaintiff on or about August 16, 1917:

Reporter's Statement of the Case

UNITED STATES SHIPPING BOARD,
EMERGENCY FLEET CORPORATION,
Washington, August 16, 1917.

MR. CARLO DE LUCA.

DEAR SIR: On August 3, 1917, the United States Emergency Fleet Corporation issued to the Standard Shipbuilding Company the notice or requisition set forth in inclosure marked "(A)."

In response to this communication Standard Shipbuilding Corporation, the shipbuilders, informed us that you, as owners or representatives of the owners, had entered into a contract with them for the vessels listed below:

Hull no.—	Type	D. W. tons	Date of contract
10	Cargo steamship	7,300	4-23-17
11	Cargo steamship	7,300	4-23-17
12	Cargo steamship	7,300	6-25-17
13	Cargo steamship	7,300	6-25-17

The corporation's district officer having charge of vessels in the district in which the shipbuilders are located has been instructed to take charge, for the corporation, of the completion of vessels now under construction, and has been authorized temporarily to take over your local inspecting officers at their present compensation. Will you please inform the district officer, Mr. Eads Johnson, at 115 Broadway, New York City, the names of your representatives and their compensation, sending a duplicate to this office? Your cooperation with the corporation is invited.

The corporation will consider payments of the contractor accruing since the date of requisition upon the receipt of proper vouchers and adequate information to be forwarded through its district officers.

You are requested, as soon as possible, to report to the corporation a statement in detail of the payments already made by you on each ship named above prior to the date of the requisitioning, August 3, 1917. This statement should be accompanied by the original vouchers and receipts and should be verified under oath by the proper corporate officer of your company.

It is the present intention of the corporation to reimburse you promptly, so far as funds are available,

for the payments heretofore made to the shipbuilder if, after investigation of data submitted by you, such payments are found in order and in conformity with the contract requirements.

At your further and early convenience, you are requested to submit to the corporation a statement of such indirect expenditures as you have made on account of each vessel; for instance, the cost of superintendence, original design, interest on funds already paid, and the like. The matters mentioned will require careful audit, and in addition you may submit any other matters you deem pertinent.

It will be perceived that the corporation presumes it is addressing this letter to the owners, or responsible representatives of the owners, or persons entitled to receive compensation on account of the requisition of the vessels listed above. The corporation requests that there be included in your response to this letter all evidence of ownership which is necessary to establish the right of those who are entitled to receive the compensation provided by law.

The consummation of the orders herein, and heretofore transmitted, will be made the subject of later appropriate action.

Very truly yours,

(Sgd.) W. L. CAPPS,
General Manager.

UNITED STATES SHIPPING BOARD,
EMERGENCY FLEET CORPORATION,
Washington, August 15, 1937.

(Enclosure to Mr. Carlo De Luca, re Standard Shipbuilding Corporation.)

By virtue of an act of Congress, approved June 15, 1917, entitled "An act making appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes", and by authority delegated to the United States Shipping Board Emergency Fleet Corporation under Executive order of the President dated July 11, 1917, all power-driven cargo-carrying and passenger ships, above 2,500 tons, d. w. capacity, under construction in your yard and certain materials, machinery, equipment, and outfit necessary for their completion are hereby requisitioned by the United States.

On behalf of the United States, by virtue of said act and said order, you are hereby required to complete

the construction of said requisitioned ships under construction and will prosecute such work with all practicable dispatch.

The compensation to be paid will be determined hereafter and will include ships, materials, and contracts requisitioned.

You will furnish immediately general plans and detail specifications of the ships requisitioned, and copies of contracts and all supplemental agreements in relation thereto and full particulars as to owner, date of completion, payments made to date, amounts still due, and any other information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts.

You will report immediately whether any additional contracts are under consideration and their character and extent, and will not enter into any additional contracts or commitments with respect to merchant tonnage without express authority from this corporation.

(Sgd.) W. L. CAPPS,
General Manager, United States Shipping Board Emergency Fleet Corporation.

WASHINGTON, D. C.,
August 3, 1917.

12. On August 22, 1917, the United States Shipping Board Emergency Fleet Corporation sent to its district officer at New York City, Eads Johnson, the following letter, a copy of which Johnson sent to the Standard Shipbuilding Corporation:

UNITED STATES SHIPPING BOARD,
EMERGENCY FLEET CORPORATION,
Washington, August 22, 1917.

MR. EADS JOHNSON,
115 Broadway, New York City.

DEAR SIR: Referring to the vessels under construction in the yard of Standard Shipbuilding Corporation, New York, N. Y., requisitioned under the corporation's order of August 3rd. Precedent to the final examination of the contract for the vessels in question, you are requested to inform the shipbuilder as follows:

The ships now under construction at your plant and referred to above, having been requisitioned by the duly authorized order of this corporation and title thereto taken over by the United States, and an order having been placed with you by due authority to complete the

construction of said ships with all practicable dispatch, you are further ordered by the President of the United States, represented by this corporation, to proceed in the work of completion heretofore ordered, in conformity with the requirements of the contracts, plans, and specifications under which construction proceeded prior to the requisition of August 3, 1917, in so far as the said contract describes the ship, the materials, the machinery, equipment, outfit, workmanship, insurance classification, and survey thereof, including the meeting of the requirements of the said contract and all tests as to efficiency and capacity of the ship on completion, and in so far as the contract contains provisions for the benefit and protection of the person with whom the contract was made, but not otherwise.

All work will proceed under the same inspection of such persons as have been or may hereafter, from time to time, be designated by this corporation for that purpose.

For the work of completion theretofore and herein ordered the corporation will pay to you the amounts equal to payments set forth in the contract and not yet paid; provided that on acceptance in writing of this order you agree on final acceptance of the vessel to give a bill of sale to the United States in satisfactory form, conveying all your right, title, and interest in the vessel, together with your certificate that the vessel is free from liens, claims, or equities with the exception of those of the owner, and then only to those set forth in the contract. Compensation to the shipbuilder for expedition and for extra work will, when deemed appropriate, be made the subject of a subsequent order.

This work applies only to vessels actually under construction, and in accepting it the corporation expects you to inform it of the actual stage of construction of each vessel or the parts to be assembled therein on the date of requisitioning, August 3, 1917. The corporation reserves the right to decide whether or not a vessel was actually under construction on August 3, 1917, on consideration of the ascertained facts.

In replying to this communication, please arrange to specify separately the vessels to which this order refers and refer to the corresponding contract in sufficient terms for identification of it.

Please furnish a copy of this to Standard Shipbuilding Co. and ask for an early reply.

Very truly yours,

(Sgd.) W. L. CAPPS,
General Manager.

13. On September 7, 1917, Eads Johnson, district officer of the United States Shipping Board Emergency Fleet Corporation, sent to the Standard Shipbuilding Corporation the following letter:

STANDARD SHIPBUILDING CORPORATION,
Shooters Island, N. Y., September 7th, 1917.

Subject: Status of vessels commandeered.

DEAR SIRS: In reply to your many communications relative to the status of vessels which have been commandeered, and that you are withholding orders necessary to fulfill requirements under commandeering act, I am instructed to inform you that—

No change will be made in method of requisitioning and that the corporation requires you to proceed with the completion of these vessels in accordance with instructions already given without delay.

Respectfully,
——— ———, *District Officer.*

In reply the Standard Shipbuilding Corporation sent the United States Shipping Board Emergency Fleet Corporation the following letter:

NEW YORK, *September 10th, 1917.*

EADS JOHNSON, Esq.,
District Officer, United States Shipping Board,
Emergency Fleet Corporation,
115 Broadway, New York City.

DEAR SIR: We acknowledge receipt of your letter of the 7th instant.

We note what you say regarding the method of requisitioning vessels and we will accordingly proceed, without delay, with the completion of these vessels following the instructions given. Of course, we must make this reservation, that unless we are paid a sum equal to the sums set out in the contract there will, of necessity, result a delay in construction; the responsibility of that, however, will rest with your principals, not with us.

We would respectfully request that you give consideration to the labor situation now pending. It has been stated in meetings of the old Shipping Board that in the event of any increase in the cost of labor this increase will be added to the price of the vessels as set out in the contracts.

Are we correct in assuming that if the Labor Adjustment Board now in session increases the cost of labor

on any of these vessels that your board will add to the price of the vessels as determined in the contract the added cost of labor so fixed by such board?

Yours very truly,

STANDARD SHIPBUILDING CORPORATION,
GABRIEL JUVE, *First Vice President.*

14. On October 16, 1917, the United States Shipping Board Emergency Fleet Corporation and the Standard Shipbuilding Corporation entered into an agreement, as follows:

UNITED STATES SHIPPING BOARD,
EMERGENCY FLEET CORPORATION,
2ND DISTRICT, 115 BROADWAY,
New York City, October 16, 1917.

STANDARD SHIPBUILDING CORPORATION,
44 Whitehall Street, New York City.

GENTLEMEN: Our representatives have examined your plant, have conferred with the representatives of the Guaranty Trust Company, the Equitable Trust Company, and the Columbia Trust Company in reference to amounts held by these companies in escrow guaranteeing the performance of your contracts with the parties who were the owners thereof prior to the issuance of the requisition order of August 3rd, 1917.

Under the arrangements evidenced by the letters which have heretofore passed between your company and our corporation, we agree to pay an amount equal to the total amount unpaid on your contracts with the former owners.

We have ascertained from an examination of these contracts that the total sum provided to be paid was $13,552,550.00. From your trial balance of September 29th, 1917, we ascertain that you have received payments on account of these contracts in the sum of $6,611,224.04. The difference between these two sums is $6,941,325.96. This total sum included, according to the statement of commissions which you have delivered to us, and which is dated September 25th, 1917, $170,988.80. This latter sum will be withheld from the total above stated, so that the total net amount to be paid to you will be $6,770,338.00.

As to the commissions or brokerage charges, we request you to make no further payments, and we agree to hold you harmless from any loss occasioned to you by reason of such action. This, of course, is upon the

understanding that you will deliver to us all process served upon you by any of the persons claiming such commissions, that you will provide us with full information relating thereto upon our request, and that you will take no action in connection therewith which will in any way change the present conditions of the brokerage arrangements.

Fuller arrangements relating to this brokerage are to be worked out between counsel for your company and our corporation to the end that the claims of these brokers may be properly resisted.

The total net sum above stated, $6,770,338.00, is to be paid to you in the following manner:

1. We are to make a deposit in a special account in the Columbia Trust Company, in New York, of $500,000.00 in the name and to the credit of your company.

2. Sums of money are to be withdrawn from this deposit and the other sums to be placed therein, by the checks of your company, signed in the usual manner, but upon condition that there is first obtained from Mr. C. S. Bookwalter, or his representative, and from their or his successors, on approval in writing, on a separate memorandum, which memorandum after such signature by our representative, will be forwarded to the trust company, and the trust company will be under instructions to pay no checks unless they have first received this memorandum of approval. Upon receipt by the trust company of such memorandum of approval, the trust company will be under instructions to pay the check in the usual course of business.

3. Such approval shall be given by our district officer, or his representative, upon submission to him of proper proof in the form of bill of lading for materials or other appropriate voucher, showing that expenses have been incurred and are due to be paid in connection with the ships which have been ordered completed by our former orders. Such expenses shall include overhead expenses, but included in such overhead expense items there shall be included only the salaries to officers which are being paid at the present time.

It is not our intention in making this provision to limit the number of your employees, either laborers or men drawing higher salaries.

4. The corporation will, from time to time, place other funds to the credit of this deposit, substantially a half million dollars.

5. It is understood that at this time steel for ship No. 14, to be built, and not commandeered, is beginning to

arrive at the yards, and payment therefor must be made in the ordinary course of business. Arrangements will be made hereafter between your company and our corporation, to the end that these payments shall be in a manner mutually agreeable to both parties financed.

It is our intention to consider promptly the question of placing orders with you for other ships, for which you have purchased certain portions of the material, and if mutually satisfactory, arrangements can be made as to these, and the foregoing plan will be altered to suit the circumstances.

The corporation will, of course, consent to the payment out of said sums so to be deposited the amount of all taxes which your company is required to pay. It is understood that no dividends shall be paid prior to June 30th, 1918. The approval of payment of dividends shall be conditioned upon your company showing that it will be financially able to complete the ships already ordered, upon receipt of the sum remaining unpaid on June 30th, 1918.

It is understood that nothing provided herein shall preclude your company from extending its yards either by the increase of machinery, by other additions to the yard, or in the way of additional land or additional slips.

Nothing herein contained shall be understood as limiting your company in the exercise of statutory rights in the way of increasing its capitalization, either by increase of its stock or by the issue of bonds.

Very truly yours,

UNITED STATES SHIPPING BOARD,
EMERGENCY FLEET CORPORATION,

(Sgd.) By C. S. BOOKWALTER, *District Officer.*

(Subject to approval of the general manager.)

The foregoing plan is satisfactory to the officers of the Standard Shipbuilding Corporation, but subject to its ratification by its board of directors.

(Sgd.) J. MARIMON,
President, Standard Shipbuilding Corporation.

This letter was subsequently approved by the general manager of the United States Shipping Board Emergency Fleet Corporation and by a resolution of the board of directors of the Standard Shipbuilding Corporation at a meeting thereof on October 18, 1917.

15. Prior to August 3, 1917, the Shipbuilding Corporation had placed orders for a part of the materials to be used in hulls Nos. 12 and 13. Included in such materials were certain of the plates, structural members, machinery parts, and fittings. These materials were delivered to the Shipbuilding Corporation after August 3rd and used in construction of hulls 12 and 13. Such materials were purchased at prices lower than those prevailing after August 3, 1917.

16. Said hulls Nos. 12 and 13 were, each, 3.5 percent completed on August 3, 1917, the Standard Shipbuilding Corporation was able and willing to complete said vessels, and the plaintiff was able and willing to make payment in full for such completion, in accordance with the contracts set out in finding 5 above.

17. The vessels were completed in accordance with the plans and specifications attached to and make a part of the contracts of June 25, 1917, with the modifications and changes, so far as practicable, stated in finding 9.

The vessels were completed and delivered to the United States on April 3, 1919, and May 5, 1919, respectively.

18. The cost of the construction of the two vessels, hulls 12 and 13, was the sum of $3,127,889.82, of which $519,485.93 was for overhead, the items of which do not appear. The two vessels cost $572,889.82 more than the contract price of $2,555,000.00. The United States Shipping Board Emergency Fleet Corporation in its settlement with the shipbuilder took credit for the total sum, $562,100.00, paid by plaintiff to the shipbuilder.

19. March 23, 1918, plaintiff, in accordance with the provisions of the Act of June 15, 1917, filed with the United States Shipping Board Emergency Fleet Corporation a claim for just compensation of $2,552,189.72 on account of the requisition of his property, such claim being divided into the following items:

(1) Amounts paid by plaintiff to the Standard Shipbuilding Corporation, on account, for the construction of hulls 12 and 13	$562, 100. 00
(2) Amounts expended and incurred by plaintiff in connection with and incidental to the purchase and construction by the Standard Shipbuilding Corporation of hulls 12 and 13	$311, 089. 72

(3) The fair value of hulls 12 and 13 and the loss of profits sustained by plaintiff as a result of and in consequence of the requisitioning of these vessels	1, 679, 000. 00
	$2, 552, 189. 72

In addition interest was claimed at 6 percent per annum from June 25, 1917, to date of settlement.

Negotiations thereafter took place between representatives of the United States Shipping Board Emergency Fleet Corporation and plaintiff with reference to the subject matter of the claim, which resulted in a tentative agreement, conditioned upon final approval by the United States Shipping Board Emergency Fleet Corporation. This agreement provided in part that plaintiff should be awarded the sum of $562,100 as just compensation, subject to the provision that, in the event the amount of such award was unsatisfactory to him, he would be paid 75 percent thereof and retain, under the Act of June 15, 1917, the right to bring suit for the full amount of just compensation. The United States Shipping Board Emergency Fleet Corporation refused to approve the agreement and it accordingly did not become effective.

Further negotiations followed between representatives of the United States Shipping Board Emergency Fleet Corporation and plaintiff in which various efforts were made to effect a settlement of the claim. In these and prior negotiations plaintiff's representative urged an early settlement primarily because of plaintiff's serious financial condition, calling attention to plaintiff's need for funds to carry on his business and waiving certain contentions in the claim in order to secure prompt action.

March 3, 1919, plaintiff's representative accepted a proposal of a representative of the United States Shipping Board Emergency Fleet Corporation for a settlement of the claim by the payment to plaintiff of $602,100, which was made up of two items, namely, $562,100, the amount paid by plaintiff to the Standard Shipbuilding Company, on account, for the construction of the vessels, and $40,000 on account of expenses incurred by plaintiff in connection

with the undertaking. March 18, 1919, the United States Shipping Board Emergency Fleet Corporation decided to authorize settlement on the basis of that proposal, and adopted a resolution to carry it into effect. Pursuant to such understanding and decision an agreement was executed March 19, 1919, by the United States Shipping Board Emergency Fleet Corporation, by the Standard Shipbuilding Corporation, and by a representative of plaintiff, which provided for the payment to plaintiff by the United States Shipping Board Emergency Fleet Corporation of $602,100 in full settlement of plaintiff's claim, and that amount was paid to plaintiff June 11, 1919.

20. Subsequently the plaintiff instituted suit in this court seeking to recover just compensation for the taking of his contracts. It was alleged in the petition that the settlement of his claim, as set out in the preceding finding, was entered into by him under circumstances of coercion and fraud amounting to duress, and that the release executed by him upon the receipt of the payment of $602,100 was null and void. The court, upon a consideration of the case, dismissed plaintiff's petition (69 C. Cls. 262), and the Supreme Court denied certiorari (282 U. S. 862).

21. On and before August 3, 1917, and afterwards, the increased production of ships for the prosecution of the war was an urgent necessity.

In 1916 and 1917 contracts were made with American shipyards for construction of ships for citizens of the United States and citizens and subjects of other nations. Beginning early in 1916 and continuing until August 3, 1917, such contracts were the subject of free and ready sale and were frequently transferred from the original owners to assignees and by the first and later assignees to subsequent assignees. There was an active demand for such contracts. The market value of these contracts continually rose during this period. The time of greatest market activity was in March and April 1917.

The plaintiff's two contracts on August 3, 1917, had a fair market value of $260 per ton, or $3,796,000, which amount less the contract price of the vessels was the value

of plaintiff's right, title, and interest in and to the contracts on the date of their requisition by the defendant.

22. Just compensation to the plaintiff for his rights and contracts which were appropriated by the Government was the sum of $1,241,000 as of the date of the taking of the contracts August 3, 1917.

The court decided that plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff, on June 25, 1917, entered into two contracts with the Standard Shipbuilding Corporation of New York, under the terms of which the Shipbuilding Corporation agreed to build for the plaintiff two single-screw, 'tween deck, steel cargo steamships each of 7,300 dead-weight tons at an agreed price of $175 per ton, making the cost or contract price of $1,277,500 for each ship, or $2,555,-000 for both ships, such price being payable in certain installments as set forth in the contracts.

The two contracts were identical other than that one vessel was to be completed on May 31, 1918, and the other on June 30, 1918.

On August 3, 1917, the United States sent a telegram, and a letter confirming the telegram, to the Standard Shipbuilding Corporation requisitioning all power-driven vessels above 2,500 dead-weight tons under construction in the Standard Shipbuilding Corporation yards, and requiring the corporation to complete the construction of such vessels for the United States. Among the contracts thus requisitioned were the two contracts involved in this suit. The plaintiff was formally notified of the requisition of his contracts on August 16, 1917, prior to which time he had paid two installments on each of the contracts totaling $562,100. The vessels were each 3.5 percent completed on August 3, 1917, and the Standard Shipbuilding Corporation was able and willing to complete them, and the plaintiff was able and ready to pay for the same.

The two vessels were completed by the Standard Shipbuilding Corporation and delivered to the United States on April 3, 1919, and May 5, 1919, respectively, the total cost

of construction being $3,127,889.82, or $572,889.82 more than the contract price of $2,555,000.

Subsequent to the taking over of the contracts by the United States the plaintiff filed with the United States Shipping Board Emergency Fleet Corporation a claim for just compensation on account of the requisitioning of his property. After prolonged negotiations an agreement was reached between the parties for a settlement of the claim by payment to the plaintiff of $602,100. This amount represented the sum of $562,100 paid by plaintiff to the Shipbuilding Company, on account, for the construction of the vessels, and $40,000 on account of the expenses incurred otherwise by plaintiff in connection with the undertaking. The amount of $602,100 was paid to plaintiff on June 11, 1919, and was accepted by him in full settlement of his claim growing out of the taking of the two contracts.

The plaintiff, in July 1929, instituted suit in this court seeking to set aside the settlement and release of his claim against the United States for compensation for the taking of the vessels on the grounds that the agreement of settlement and release of the claim by him was executed by coercion and under duress and that the release was consequently null and void; the plaintiff prayed for such relief as he was entitled to under the facts stated, and that he be awarded judgment against the United States for the sum of $1,074,950, with interest from August 3, 1917. The court, upon consideration of the case, dismissed the plaintiff's petition (69 C. Cls. 262), and certiorari was denied by the Supreme Court (282 U. S. 862).

Thereafter, the plaintiff petitioned Congress for relief, with the result that on June 26, 1934, an act of Congress was approved conferring on the Court of Claims jurisdiction to hear and determine the plaintiff's claim. The act provided:

> That the Court of Claims of the United States be, and it is hereby, given jurisdiction to hear and determine the claim of Carlo de Luca, and to award him just compensation for losses and damages, if any, which he may have suffered through action of the United States Shipping Board Emergency Fleet Corporation in commandeering or requisitioning two certain contracts

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dated June 25, 1917, which the said Carlo de Luca owned and which he had with the Standard Shipbuilding Corporation of New York for the construction and delivery of two certain ships designated as "hulls 12 and 13"; and to enter decree or judgment against the United States for such just compensation, if any, notwithstanding the bars or defenses of any alleged settlement or adjustment heretofore made or of res judicata, lapse of time, laches, or any statute of limitation: *Provided, however*, That the United States shall be given credit for any sum heretofore paid the said Carlo de Luca by reason of said action of the United States Shipping Board and/or the United States Shipping Board Emergency Fleet Corporation.

Sec. 2. Such claim may, under section 1 of this Act, be instituted at any time within four months from the approval of this Act. Proceedings in any suit brought in the Court of Claims under this Act, appeals therefrom, and payment of any judgment therein shall be had as in the case of claims over which such court has jurisdiction under section 145 of the Judicial Code, as amended.

The plaintiff within the time required by the jurisdictional act instituted the instant suit seeking to recover just compensation for the taking of the two contracts involved. The jurisdictional act not only waives the bar of the statute of limitations as a defense against the claim but also waives the settlement and adjustment of the claim by which plaintiff was paid $602,100 on June 11, 1919, and the defense of *res judicata* in respect to the previous action on the claim in this court and the Supreme Court. The plaintiff therefore stands before the bar of the court in exactly the position he would be had he not made the settlement and instituted timely suit under the general jurisdiction of the court for just compensation for the taking of his contracts, as numerous other plaintiffs similarly situated have done, to whom the court has awarded just compensation. The only limitation on the award he is entitled to receive under the jurisdictional act is that payments heretofore received by him shall be credited against the same.

The question as to what constitutes just compensation for private property taken for public use and the method by which it shall be computed has been considered by the

courts in many cases and the rule to be followed is quite well established. It has been held that just compensation is "the sum that in all probability would result from fair negotiations between an owner willing to sell and a purchaser desiring to buy." *Standard Oil Co.* v. *Southern Pacific Co.*, 268 U. S. 146; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106. It is the "full money equivalent of the property taken." *United States* v. *New River Collieries Co.*, 262 U. S. 341. In other words just compensation is the value of the property taken at the time of the taking when compensation is paid contemporaneous with the taking. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *Vogelstein & Co.* v. *United States*, 262 U. S. 337; *United States* v. *New River Collieries Co.*, *supra*, and *Brooks-Scanlon Corp.* v. *United States*, *supra*. Where the taking precedes the payment of compensation the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of the value paid contemporaneously, and interest at a proper rate is held to be a good measure of the amount to be added. *Seaboard Air Line Ry. Co.* v. *United States*, 261 U. S. 299; *United States* v. *Benedict*, 261 U. S. 294; *Brown* v. *United States*, 263 U. S. 78, and *Brooks-Scanlon Corp.* v. *United States*, *supra*. Where the article or thing taken has an established market value at the time of the taking, the prices current in such market will be regarded as the fair market value of the article or thing taken and likewise the measure of just compensation for its taking. *United States* v. *New River Collieries Co.*, 276 Fed. 690 (affirmed 262 U. S, 341); *Standard Oil Co.* v. *Southern Pacific Co.*, *supra; Boom Co.* v. *Patterson*, 98 U. S. 403; *Vogelstein* v. *United States*, *supra; Hudson Navigation Co.* v. *United States*, 57 C. Cls. 411; *Gulf Refining Co.* v. *United States*, 58 C. Cls. 559.

The findings disclose that during 1916 and 1917 many contracts were made with American shipyards for the construction of ships for citizens of the United States and citizens of other countries, and that beginning in 1916 and continuing until August 3, 1917, when plaintiff's contracts were requisitioned, and thereafter, such contracts were subject to free and ready sale and were frequently transferred

from the original owners to assignees and by the first and later assignees to subsequent assignees; that there was an active demand for such contracts, and that the market value of these contracts continually rose during this period. The plaintiff, therefore, had he desired to sell the contracts in question could easily have done so on the date of their requisition, August 3, 1917, there then being a ready and active market for them. The plaintiff has submitted in evidence a record of numerous sales of such contracts for the months immediately preceding and following the date on which his contracts were requistioned. On the basis of the prevailing prices at which these contracts were bought and sold, the fair market value of the plaintiff's two contracts, on August 3, 1917, is conclusively shown to have been not less than $260 per ton. In addition to this record of actual sales, the plaintiff has established by expert witnesses of the highest character and standing that $260 per ton was the market value of the contracts at the date on which they were requisitioned. There can be no question that the plaintiff could have disposed of his two contracts on August 3, 1917, at $260 per ton, and he is clearly entitled to an award of compensation on the basis of that valuation. We have therefore found (Finding No. 22) that just compensation to plaintiff, that is the sum that would put him in as good position pecuniarily as if his property had not been taken by the defendant, was as of August 3, 1917, the date of the taking, the sum of $1,241,000.00.

Under the law of the case the plaintiff, upon the facts shown, is entitled to recover the sum of $1,592,464.46, computed as follows:

Just compensation due plaintiff as of August 3, 1917	$1, 241, 000. 00
Interest thereon at 6% per annum from Aug. 3, 1917, to June 11, 1919	138, 164. 64
	1, 379, 164. 64
Less amount paid June 11, 1919	602, 100. 00
Balance	777, 064. 64
Interest on balance at 6% per annum from June 11, 1919, to date (December 7, 1936)	815, 399. 82
Total amount due plaintiff to date	1, 592, 464. 46

Judgment is accordingly awarded plaintiff in the sum of $1,592,464.46, together with interest on $777,064.64 thereof from December 7, 1936, until paid. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

CONTINENTAL MILLS. INC., v. THE UNITED STATES

[No. 42886. Decided December 7, 1936]

On the Proofs

Processing Taxes; right of action against Government; jurisdiction of claim.—The United States cannot be sued as of right; a plaintiff must bring his case within the authority of some act of Congress, and comply with the conditions prescribed by the statutes.

No vested right in remedy granted by Congress against the Government.—The Granting by Congress of a remedy by claim or suit against the Government confers no vested right in such remedy, and it may be changed, modified, or withdrawn at the pleasure of Congress.

Jurisdiction of claim; failure to comply with subsequent jurisdictional requirements.—Where a suit for refund of processing taxes and the claim for refund upon which it was based complied with the statutory requirements at the time they were filed, but the plaintiff has failed to comply with subsequent additional statutory requirements as to claims and suits for refund, and proof of burden of tax, as prerequisites to the maintenance of claims or suits in all such cases, the court is without further jurisdiction in the case.

The Reporter's statement of the case:

Mr. A. H. Conner for the plaintiff. *Brewster & Maclean*, and *Mr. Kingman Brewster*, *Mr. O. R. Folsom-Jones*, and *Mr. J. W. Cutler* were on the brief.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

Plaintiff brought this suit January 7, 1935, to recover $3,160.30, with interest, floor stocks taxes paid under Title

I of the Agricultural Adjustment Act approved May 12, 1933, on articles processed from cotton and held for sale or other disposition on August 1, 1933.

In the original and amended petitions plaintiff alleged as a ground of recovery that the Agricultural Adjustment Act approved May 12, 1933, as amended, 48 Stat. 31, under which the taxes in question were paid, was unconstitutional. In January 1936 the Agricultural Adjustment Act was held invalid in *United States* v. *Butler et al.*, 297 U. S. 1, and *Rickert Rice Mills, Inc.*, v. *Fontenot*, 297 U. S. 110.

Section 21 (d) of the Act of August 24, 1935, prescribed that certain conditions therein set forth should be complied with before any refund or recovery of taxes paid under the Agricultural Adjustment Act of May 12, 1933, as amended, could be had. In Title VII, section 901 of the Revenue Act of 1936, approved June 22, 1936, sections 21 (d), (e), and (g), of the Agricultural Adjustment Act, as amended, were repealed and other sections of the same title prescribed the procedure to be followed and the conditions upon which a refund or recovery of such tax could be had. The position of the defendant is that plaintiff cannot recover in this case for the reason that it has failed to comply with the statutory requirements.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

Plaintiff, a Pennsylvania corporation with principal office and place of business in Philadelphia, filed, on August 30, 1933, a return of floor stocks taxes on account of articles processed wholly or in chief value from cotton and held for sale or other disposition by it on August 1, 1933. This return was filed in evidence by plaintiff, and the pertinent portions thereof are made a part of this finding by reference. This return showed plaintiff's liability to be $3,160.30 under the provisions of the Agricultural Adjustment Act approved May 12, 1933, as amended, 48 Stat. 31. This amount was paid to the collector of internal revenue at Philadelphia in four installments of $790.09 on August 30, 1933, and $790.07 each on September 28, October 27, and November 28, 1933. Thereafter, on December 17, 1934, plaintiff filed a claim for refund for the whole of the amount paid. This refund

claim is in evidence as exhibit A to the stipulation of facts and is made a part hereof by reference. The Commissioner of Internal Revenue rejected this claim January 3, 1935, and this suit was instituted January 7, 1935. An amended petition was filed February 28, 1935. Other than the claim for refund above mentioned, plaintiff has not filed with the Commissioner any original or amended claim for refund under section 21 of the act of August 24, 1935, and no hearing or consideration has been had in the case of this plaintiff before or by the Commissioner and no decision has been made by the Commissioner under the provisions of section 21 of the act of August 24, 1935. Nor does it appear that plaintiff has filed a claim for refund under Title VII of the Revenue Act of 1936.

The court decided that plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

After this suit was instituted the Act of August 24, 1935, amending the Agricultural Adjustment Act of May 12, 1933, was enacted. Section 21 of this act provided that no refund or recovery should be made or allowed of any amount of any tax accrued before, on, or after the date of that act, unless, after a claim had been duly filed, it should be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue and the Commissioner should find and declare of record, after notice and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, had, directly or indirectly, included such amount in the price of the article in respect of which it was imposed, or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount.

Section 21 further provided that, notwithstanding any other provision of law, no suit or proceeding for the recov-

ery of any such tax could be maintained in any court until such a claim had been filed.

Plaintiff did not comply with the above-mentioned provisions of the Act of August 24, 1935.

Section 901 of Title VII of the Revenue Act approved June 22, 1936, repealed sections 21 (d), (e), and (g), of the above-mentioned act of 1935, and in sections 902 to 904, inclusive, substantially similar provisions were enacted requiring compliance therewith before a suit, such as the one at bar, could be maintained in any court. Section 902 prescribed conditions on allowance of refunds as follows:

> No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—
>
> (a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or
>
> (b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

Section 903 provided with reference to filing of claims for refund as follows:

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> No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

Section 904 provided with reference to suits for the recovery of such tax as follows:

> Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

It is clear from the above that this suit cannot be maintained. When it was instituted it was not brought as a matter of right but pursuant to an Act of Congress. The United States cannot be sued as of right. In *United States v. Clarke*, 8 Pet. 436, 443, 444, the court said: "As the United States are not suable of common right, the party who in-

stitutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it."

And, in *Cheatham et al.* v. *United States*, 92 U. S. 85, 88, 89, it was held that "it will be readily conceded, * * * that the government has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues."

In *The Collector* v. *Hubbard*, 12 Wall. 1, 14, the court said: "Remedies of the kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the law-maker, as the taxpayer cannot have any vested right in the remedy granted by Congress for the correction of an error in taxation."

In that case the court also pointed out at page 16 that "A party cannot have any vested right in a remedy conferred by an act of Congress to prevent Congress from modifying it or adding new conditions to its exercise."

See also *Red River Valley Bank* v. *Craig*, 181 U. S. 548, 553, and *Backus* v. *Fort Street Union Depot Company*, 169 U. S. 557. In the last cited case, at page 570, the court said: "There is no vested right in a mode of procedure. Each succeeding legislature may establish a different one, providing only that in each are preserved the essential elements of protection."

In *Campbell* v. *Iron-Silver Mining Co.*, 83 Fed. 643, 646, the court said: "It cannot be said that the mere bringing of a suit entitles the party who brings it to have the same conducted at every stage according to the course of procedure which was prescribed by law when the suit was commenced. Actions are always brought in view of the known power of the legislature to change or modify rules of procedure at pleasure, and a litigant cannot consistently claim that, because the legislature takes away some privilege which was accorded to litigants when suit was instituted, he is thereby deprived of a vested right."

While the claim for refund upon which this suit is based complied, when it was filed, with the provisions of section 1103 (a) of the Revenue Act of 1932, which was the only statute in force with respect to suits for the recovery of

taxes at the time this suit was begun, Congress afterwards modified the conditions upon which suits could be brought or maintained for recovery of taxes paid under the Agricultural Adjustment Act. These additional conditions have not been complied with. In the absence of such compliance Congress has declared that notwithstanding any other provision of law no suit or proceeding, whether brought before or after June 22, 1936, may be maintained in any court for the recovery of such tax. In these circumstances the court is without jurisdiction to proceed with the case and the petition must be dismissed.

In view of our conclusion that this suit cannot be maintained, it is unnecessary to discuss other questions raised by plaintiff to the effect that the statutory provisions, compliance with which is made necessary to suits, deny due process for the reasons (a) they impose conditions to refunds which cannot be met, (b) they create a presumption in favor of the Government which is irrebuttable, and (c) they repudiate the contract right of plaintiff to a refund of monies illegally exacted. It is sufficient to state, in addition to what has already been said, that this record contains no information tending to show that it is impossible to prove whether or not the tax in question was directly or indirectly included in the price of the article in respect of which it was imposed. *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386.

The petition is dismissed, and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

THE TRANSPORTATION CLUB OF SAN FRANCISCO v. THE UNITED STATES

[Nos. 42896 and 43052. Decided December 7, 1936]

On the Proofs

Excise tax; club dues and fees, social club.—Upon a finding by the court that the social activities of the plaintiff club were not merely incidental to the predominant purpose and activity

of the club, but were availed of for the purpose of attracting new members who would aid in its maintenance, and thus become an essential part of its activities and a material feature of its continued existence; *held*, that plaintiff was a social club within the meaning of the statutes taxing membership dues and fees paid to social, athletic, or sporting clubs.

Same.—Where the social features of a club are so materially interwoven into the entire fabric of the club that without them the club could not exist, it is a social club within the intent of the statutes taxing dues and fees of members of social, athletic, or sporting clubs or organizations.

The Reporter's statement of the case:

Mr. Byron G. Carson for the plaintiff.

Mr. Fred K. Dyar, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a California corporation which was organized in 1904. It has existed and operated since that time with its location and principal place of business in San Francisco, California. Its original articles of incorporation set forth its purpose as being:

> To establish a social organization to promote and further the good-fellowship, business interests, and culture of its members; to purchase, acquire, and hold, in the City and County of San Francisco, State of California, property, real and personal, suitable for the purposes of said corporation; to borrow money and to give evidences of indebtedness therefor; to lease, sell, mortgage, convey in trust, release from trust or mortgage, use, take possession of, and enjoy in fee-simple, or otherwise, any property, real or personal, within this State, necessary or convenient for the uses and purposes of of the corporation; and generally to secure to its members the benefit of cooperation.

The foregoing provision was amended January 24, 1929, in accordance with a resolution of plaintiff's Board of Directors adopted November 14, 1928, to read, in so far as here material, as follows:

> To establish and conduct a club to aid in fostering and developing the transportation business and the commercial interests of the entire community of San Fran-

cisco and vicinity and in aid of such purpose, to purchase, acquire, and hold in the City and County of San Francisco, State of California, property, real and personal, suitable for the purposes of said corporation.

To acquire by purchase, lease, or otherwise, and conduct suitable quarters for the meetings of its members as a whole or in groups.

2. During the period July 1929, to June 1933, both inclusive, plaintiff paid $9,812.75 as taxes on dues and initiation fees of its members, and likewise during the period July 1933, to November 1934, both inclusive, plaintiff paid taxes on dues and initiation fees of $2,653.53. The payments were made monthly, the earliest payment herein involved being made August 10, 1929, and all payments being made as set out in plaintiff's exhibits 1 and 4, which are incorporated herein by reference. The total payments of $9,812.75 are sought to be recovered in case No. 42896 and the total payments of $2,653.53 are sought to be recovered in case No. 43052.

Except for payment of tax, and the filing of claims for refund, together with action thereon, the facts herein found are, by agreement of the parties, made equally applicable to both cases.

3. July 26, 1933, plaintiff filed a claim for the refund of the first payments referred to in finding 2 ($9,812.75), assigning as a basis therefor that it was not a social club within the meaning of the applicable internal revenue statutes. July 19, 1934, the Commissioner of Internal Revenue rejected the claim on the ground that the social features of the organization form a material part of its purpose and activities and therefore cause it to qualify as a social club within the meaning of section 501 of the Revenue Act of 1926 as amended by section 413 of the Revenue Act of 1928.

March 6, 1935, plaintiff filed a similar claim on account of the second payment referred to in finding 2 ($2,653.53) and that claim was rejected by the Commissioner March 22, 1935, for reasons similar to those advanced in connection with his action on the first claim.

4. The membership of plaintiff (herein sometimes referred to as "the club") is made up largely of men inter-

ested in matters pertaining to transportation. In most instances the members are directly concerned either with furnishing transportation, such as representatives of railroads, steamship companies, trucking interests, etc., or those concerned with the use of transportation facilities for the shipment of the commodities of the companies, organizations, or agencies with which they are connected. However, there is no prohibition in the articles of incorporation against those not interested in transportation becoming members of the club, and in some instances members are admitted who have, at most, only an indirect interest in transportation problems, including attorneys, physicians, insurance agents, etc.

Since 1922 plaintiff has been a member of the Associated Traffic Clubs of America, a national organization of clubs interested in matters pertaining to transportation. That national organization issues bulletins semi-annually outlining work on various transportation subjects, and these bulletins are distributed without charge to plaintiff's members. In addition plaintiff receives and acts upon resolutions affecting transportation, which are received from the national organization.

5. The membership of the club was approximately 612 in 1929, but it declined gradually during the period of the depression to slightly less than 400 in 1934. Originally the initiation fee was $25, but about the beginning of the period 1929 to 1934 it was found necessary, because of the desire to secure new members to replace those who were being lost, to reduce that fee to $10, later to $5, and to dispense with it entirely for a certain period. During the period involved in these proceedings the monthly dues, including Federal tax, were $5.00, and during a part of that period those dues were billed to the members as dues $4.54 and tax 46 cents. In some instances the dues of certain members of the club are paid either directly or indirectly by the employers of those members.

The club is not operated for profit. Its average annual gross income during the period involved in these proceedings was approximately $31,000, from 80 to 90 percent of

which was derived from dues. The principal expenditures are for rent and salaries and wages of employees.

6. Plaintiff's officers consist of a president, first vice-president, second vice-president, and secretary-treasurer, and a board of directors, all of whom serve without pay. There are 10 standing committees with membership approximately as follows:

House, 4 to 6 members;
Auditing, 2 members;
Entertainment, 1 to 2 members;
Membership, 3 to 5 members;
Speakers, 1 member;
Hospitality, 2 to 3 members;
Transportation, 3 members;
Educational, 4 to 5 members;
Publicity and Editor of "Time Card", 1 member;
Librarian, 1 member.

The club employs the following paid employees: assistant secretary, who keeps the club records; a steward and his relief man; and three Chinese boys, who work in shifts as porters and houseboys.

7. The club occupies quarters in the Palace Hotel, a large and centrally located hotel on Market Street in the business district of San Francisco, for which it paid a rental varying from $12,000 per year for the first year involved in these proceedings to $9,100 for the last year. The furnishings therein, except for a piano and the chinaware, are owned by the club, and were carried on its financial statements at net amounts varying from $10,115.64 in 1929 to $4,495.02 in 1934, the reductions being accounted for in most part by reductions for depreciation. The quarters are on the ground floor and second floor of the hotel, with an entrance from the street and from the hotel lobby. The club is open from 8 a. m. to 1 a. m. during week days and from 9 a. m. to 7 p. m. on Sundays. As will hereinafter appear, the principal use of the club quarters is during the luncheon period, though the facilities of the club are available during the hours just mentioned, and a relatively small num-

ber of members make use of them at hours other than the luncheon period.

On the ground floor are a lobby entrance with telephone booths, coat room and wash room, buffet and reception or club room, and on the second floor are an office, coat room and lavatory, library, and a large room which is divided by a temporary partition to provide a dining room and pool and billiard room.

The buffet is divided into two small rooms, one of which contains a small fully equipped bar and the other is equipped and operated as a lunch room. The patronage at the bar averages 10 to 15 during the luncheon period and 5 to 6 at various times in the evening. The bar is permitted to serve drinks in the club and also to sell bottled goods to be taken away. It is kept open for the same period as the rest of the club. Little business is done on Sundays, though the bar is open. In addition to alcoholic beverages from the bar, and light lunches from the lunch room, cigars, cigarettes, candy, and cards are on sale. There is a radio in the lunch room.

The reception, club, or gaming room is equipped with 18 or 20 domino tables, each conveniently accommodating 4 players. During the luncheon period from 12:15 to 2 p. m., an average of from 30 to 40 persons are engaged in playing dominoes, usually being served with sandwiches, glasses of milk or beer, or some other form of light lunch from the buffet while playing. During the afternoon and evenings use is made of the domino tables, but the number playing is small compared with those so engaged during the luncheon period. There are a davenport and six or seven overstuffed chairs in this room in addition to the chairs used at the gaming tables. There is also a poker table available but it is rarely used. Bridge is also engaged in at the club, one or two tables being used for that purpose.

The billiard room is equipped with two billiard and two pool tables, with the usual equipment and facilities appertaining thereto. Three or four members ordinarily use these tables during the luncheon period and there is some use of them at other periods of the day, though the principal use

is during the luncheon period. No charge is made to members for the use of these tables.

The dining room is in reality a part of the same large room as the billiard room, being separated therefrom by a movable temporary partition which is ordinarily located to make the dining room about twice the size of the billiard room. The dining room is equipped to serve approximately 100 persons with an average attendance at the noonday luncheons during week days of 50, except Saturdays when about 8 or 10 are served. No meals are served on Sundays, no breakfasts at any time, and dinners only by special arrangements which are infrequent. The meals are served by the Palace Hotel, the food, dishes and chinaware, and waiters being furnished by the hotel. The assistant secretary collects for the meals when served and makes remittance to the hotel without any charge or credit appearing on the books of the club.

The library is furnished with three davenports, approximately twelve upholstered chairs, two writing desks, two center tables, eight or nine lamps, oil paintings, rugs, and draperies. It contains nine bookcase sections, each having four or five shelves. The books are largely standard literature, with fiction predominating, and with very few dealing with matters solely related to transportation. In addition there are standard dictionaries and encyclopedias. The club subscribes to approximately 22 magazines of the standard and popular variety and in addition it receives three or four magazines without charge. All of the above magazines are to be found in the library and only two or three of them deal with matters primarily related to transportation. The library is used at all hours when the club is opened as a reading and writing room of the character contemplated by its furnishings and equipment.

8. The club sponsored social functions as shown below for the purpose of bringing members of the club together and increasing interest in the club. The first three mentioned are of annual occurrence, to which the family and friends of members are invited. Otherwise, except at irregular intervals, ladies are not permitted in the club and no special

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accommodations are provided for them. These social affairs are underwritten by the club and tickets are usually sold to defray the cost. The social functions held and the cost of them to the club are shown by the following tabulation which covers the greater part of the period involved in these proceedings (the period omitted being comparable to that shown herein):

	Fiscal Year Ending				
	Feb. 28, 1929	Feb. 28, 1930	Feb. 28, 1931	Feb. 29, 1932	Feb. 28, 1933
Christmas Jinks	$600.80	$427.79	$474.47	$271.38	$298.96
New Year Party	229.95	139.51	196.98	109.87	69.44
Christmas Luncheon	117.86	173.78	39.60	90.37	47.70
Ladies Night	88.58	110.56	90.10		5.75
Board of Directors' Luncheon		110.65			
Other Luncheons		110.25	95.65	94.95	31.90
Golf Tournaments	340.88	120.84	14.73		
Football Dinner Dance	87.00	(20.15)	20.15		
Entertainment of Associated Traffic Clubs	252.44				
Halloween Party			90.57		
Expense a/c Annual Meeting			81.84	50.31	
Anniversary Dinner					308.40
Smoker				37.48	198.75
Total	1,717.51	1,173.23	1,104.09	654.36	960.90

9. The club has no facilities for athletic events of any kind such as golf, tennis, swimming, gymnastic exercises, etc. On one occasion a golf tournament was sponsored by a club member and the club acted as a clearing house, but only 12 or 14 attended. Efforts have been made, from time to time, to stimulate interest in golf through the appointment of a golf committee, through arrangements by a club member who belonged to a golf club to have the privileges of his golf club extended to plaintiff's members, and through other means, but the interest in this sport, as directly related to the club is negligible.

10. Approximately once each month the club obtains a speaker who given an address or lecture to the members and their guests either at the noonday luncheon or in the evening. The subjects of the discourses deal largely with transportation, though in some instances other business subjects are dealt with and in a few instances the subjects have only an indirect relation to transportation or business, but

being of a general informative or instructive nature. No charge is made for these meetings and the average attendance is 150 to 200.

The quarters of the club are available for use by the Pacific Transit Association, the Pacific Railway Club, and traveling representatives of the Interstate Commerce Commission, though such use by those organizations is infrequent.

11. The club publishes a monthly bulletin known as the "Time Card" and distributes it to its members. It originated many years prior to the period involved in these proceedings, but it was not in existence during all of the period here involved. It shows the total number of members, gives the names and occupations of new members, sets out the officers and members of committees, and under "Club Notes" gives notice of meetings at the club and club activities of various members. Many of the "Club Notes" are of a personal character, showing trivial incidents relating to individual members, such as a trip out of town, a billiard, pool, or domino game, some entertainment given or arranged, and similar items.

12. The club in its organized capacity does not conduct any campaigns or sponsor any movements looking to a change in, or improvement of, transportation or business. However, through the contacts of individual members interested in transportation and business, and through the association of the club with The Associated Traffic Clubs of America (the national organization), plaintiff has exerted a strong influence for the improvement of transportation and business conditions in the San Francisco area, which is an important transportation center, second only to New York City.

The club provides a place where the members meet and discuss questions of common interest incident to their businesses or professions, matters relating to transportation predominating. Members meet business associates at the club—either by prearrangement with members or with guests whom they take to the club or because men of related interests are members of the club. Such meetings

facilitate the transaction of business by the members and enable them to form friendships and acquaintances of business value. The predominant purpose and activity of the club are to provide facilities for and make possible the meetings and contacts of the character described above.

In addition the club is a place of social relaxation and enjoyment during meetings connected with the predominant purpose and activity of the club and during other times when desired, as heretofore shown. These social activities are not merely incidental to the predominant purpose and activity of the club but are availed of for the purpose of attracting new members who will aid in the maintenance of the club and join in its purpose and have in this way become an essential part of its activities and a material feature of its continued existence.

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petitions are therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be ascertained by the clerk and collected by him according to law.

The court decided that plaintiff was not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

Plaintiff seeks to recover taxes paid upon club dues and initiation fees during the period July 1929 to November 1934, inclusive. Two suits are involved but in view of the identity of the questions presented, they have been consolidated for the purpose of taking testimony and submission to the court. The first suit covers the period July 1929 to June 1933, inclusive, and seeks to recover $9,812.75 with interest and the second suit covers the period July 1933 to November 1934, inclusive, and seeks to recover $2,653.53 with interest.

The applicable statute, section 413 of the revenue act of 1928, which amends section 501 of the revenue act of 1926, imposes a tax of ten per centum of the amount paid "as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $25.00 per year; * * *."

Syllabus

This provision is practically identical with the corresponding provision (section 701) which appeared in the revenue act of 1917 and which has been repeated in subsequent revenue acts. Many cases have arisen in this court and other courts on the question here presented, namely, whether plaintiff is a social club, and, as we said in *Chicago Engineers' Club* v. *United States*, 80 C. Cls. 621,

> * * * the rule seems now well settled that if the predominant purpose of an organization is not social and its social activities are merely incidental to the furtherance of its different and predominating purpose, the organization is not a social club within the meaning of the taxing acts. If, on the contrary, the social features of an organization are a material part of its activities and necessary to its existence, and are not merely incidental to its predominant nonsocial purpose, it is regarded as a social club within the meaning of the revenue laws. *Army & Navy Club of America* v. *United States*, 72 C. Cls. 684, 53 Fed. (2d) 277.

In this class of cases, it has been repeatedly held that each case must stand on its own peculiar facts. We do not think it necessary to discuss the facts in this case for the reason that the special findings of fact made by the court set them out in detail. They show that the social features are so materially interwoven into the entire fabric of the club that without them the club could not exist. Applying the rule established in the *Engineers' Club case*, *supra*, the petitions must be dismissed. It is so ordered.

WILLIAMS, *Judge*; LITTLETON, *Judge*; GREEN, *Judge*; and BOOTH, *Chief Justice*, concur.

THE EVENING STAR NEWSPAPER COMPANY OF WASHINGTON, A CORPORATION, v. THE UNITED STATES

[No. 42905. Decided December 7, 1936]

On the Proofs

Excise tax on dividends; declaration of dividends; section 213, National Industrial Recovery Act.—Where the president of the plaintiff corporation had authority from the corporation to

pay such dividends from its profits as would in his judgment be consistent with the policy of the corporation as to the maintenance of ample reserves, and in January 1933, directed the proper officer of the corporation to pay the same regular dividends for the year as had been paid during a number of years past, there was a declaration of such dividends within the contemplation of the provision of section 213 of the National Industrial Recovery Act of June 16, 1933, exempting from taxation thereunder dividends declared prior to the date of enactment of such act.

The Reporter's statement of the case:

Messrs. George E. Hamilton, jr., and *Charles D. Hayes*, for the plaintiff. *Hamilton & Hamilton* and *Hayes & Hayes* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation, organized under an Act of Congress, engaged in the publication of a newspaper in the City of Washington.

2. Pursuant to Section 213 of the National Industrial Recovery Act of June 16, 1933, plaintiff filed monthly returns for the months June to December 1933, inclusive, relating to the tax on dividends. The returns disclosed dividends paid by the plaintiff corporation within this period in the amounts as follows:

June 30	$80,000
July 31	40,000
Aug. 31	40,000
Sept. 30	80,000
Oct. 31	40,000
Nov. 30	40,000
Dec. 31	100,000

The returns, while disclosing the payment of these dividends, reported no tax due, as the total amount of the dividends reported was also carried in each return as an amount of dividend paid from which no withholding was required. The plaintiff company paid the dividends and did not withhold the tax thereon.

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3. On September 25, 1934, plaintiff filed amended returns under protest for the period in question, reporting the same dividends with a tax thereon amounting to $21,000. The amount of tax, together with interest thereon, $2,245, was paid under protest by plaintiff on September 26, 1934.

4. On November 3, 1934, plaintiff filed a claim for refund in the amount of $23,245 and in support thereof set out the following reasons:

> The dividends paid by the Evening Star Newspaper Company for the months of June 1933 to December 1933 inclusive are not taxable under Section 213 of the National Industrial Recovery Act, approved June 16, 1933, by reason of the fact that said dividends were declared before the date of the enactment of said Act.
>
> The Company under date of August 1, 1933, filed returns with the Collector and submitted evidence that said dividends were declared prior to June 16, 1933, and during the period in question it did not withhold the tax. Under date of February 3rd, 1934, the Deputy Commissioner of Internal Revenue requested the Company to file amended returns showing the tax due. Thereafter it duly protested said request and the conclusion of the Commissioner that said dividends were subject to tax, and after a hearing in the Department it was advised under date of September 7th, 1934, that amended returns showing the tax on the dividends paid during the months in question should be filed and the total amount due paid. On September 25th, 1934, the said Company filed returns and made the payments showed thereon under protest. No tax was withheld by said Company nor has this Company been reimbursed by the stockholders on account of said payment.

On November 22, 1934, the Commissioner of Internal Revenue rejected the claim and on December 5, 1934, mailed notice of rejection to the plaintiff.

5. Since the incorporation of plaintiff the stockholders have been confined to descendants, or relatives or connections of descendants, of the three original incorporators. There have been no adverse or antagonistic elements among the stockholders. In May 1933 there were approximately twenty stockholders, of whom ten were directors of the company. Said ten directors owned 133 of the then out-

standing 200 shares of stock. Each of the 200 shares of stock was at the par value of $1,000 per share.

6. On April 10, 1914, at a meeting of the board of directors of plaintiff the following resolution was duly passed:

> *Resolved*, That the President of the Company be authorized and directed to pay such dividends from the profits of the Company as will, in his judgment, be consistent with the policy of the Company to maintain reserves ample for all emergencies.

Mr. Frank B. Noyes was president of the company at the time the said resolution was passed and has been the president continuously since that date. Since April 10, 1914, the practice of plaintiff relative to the declaration and payment of dividends was that the dividends were authorized and directed to be paid by the president. About the first of each year or early in the year the president instructed the assistant auditor, who had charge of the actual payments, what regular dividends would be paid for that year. Special dividends were paid under instructions given from time to time by the president to the assistant auditor. The checks in payment of the dividends were prepared by the assistant auditor, who also had charge of the delivery or the mailing of the same to the stockholders. After April 10, 1914, the board of directors never declared or directed the payment of any regular dividend. All regular dividends have been paid as a result of the direction of the president to the assistant auditor. There was no special dividend declared or paid during the year 1933.

7. Plaintiff from the calender year 1923, to and including the calendar year 1934, paid regular dividends each year totalling $700,000. These dividends were paid monthly as follows: $40,000 in January, $40,000 in February, $120,000 in March, $40,000 in April, $40,000 in May, $80,000 in June, $40,000 in July, $40,000 in August, $80,000 in September, $40,000 in October, $40,000 in November, and $100,000 in December. There was no variation in the amounts or dates of payments during these years.

8. At the annual meeting of the stockholders in January 1933 the president announced that the company would pay the regular dividends for that year but expressed doubt as

to the payment of any special dividends. In January 1933 the president advised the assistant auditor that the regular dividends for the year 1933 would be paid and directed him to make payments when due.

At the meeting of the board of directors on May 1, 1933, the president advised the directors that he had declared the regular dividends for the year as he had previously stated at the stockholders meeting in January 1933, but that the special dividends would be omitted. The board of directors approved the action of the president in both respects but did not pass any formal motion or resolution.

9. The president had authority to declare regular and special dividends. The president considered that his action in declaring the regular dividends for the year 1933 bound the company irrevocably to pay the dividends so declared.

10. The plaintiff's surplus as of January 1, 1933, was $6,037,459.75; as of May 1, 1933, $6,500,962.87; and as of January 1, 1934, $6,108,159. The major portion of the surplus was earned after March 1, 1913. The surplus consisted of cash of approximately $400,000, accounts receivable of approximately $400,000, and Government securities of between $325,000 and $500,000. The balance consisted of other investments, such as mortgages, investments in other companies, building, equipment, furniture, fixtures, automobiles, etc. Plaintiff had no creditors other than bills payable.

11. The dividends referred to in finding 2 herein were paid by the plaintiff and received by the stockholders after June 16, 1933, and before January 1, 1934.

12. The plaintiff has made no transfer or assignment of the claim involved in this action. The tax in controversy was not withheld from the stockholders, and no payment or reimbursement has been made to the plaintiff by its stockholders on account thereof.

The court decided that plaintiff was entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff is a corporation created by a special act of Congress July 27, 1868, and since that time has been en-

gaged in publishing in the city of Washington, D. C., The Evening Star newspaper. This suit is for the recovery of taxes assessed and collected by the Commissioner of Internal Revenue upon dividends paid by the corporation to its stockholders from June 30, 1933, to and including December 31, 1933.

Section 213 of the National Industrial Recovery Act (48 Stat. 195) approved June 16, 1933, provided as follows:

> SEC. 213. (a) There is hereby imposed upon the receipt of dividends (required to be included in the gross income of the recipient under the provisions of the Revenue Act of 1932) by any person other than a domestic corporation, an excise tax equal to 5 per centum of the amount thereof, such tax to be deducted and withheld from such dividends by the payor corporation. The tax imposed by this section shall not apply to dividends declared before the date of the enactment of this Act.

The plaintiff contends that all of the dividends paid by it were *declared* before the date of the foregoing act, and this is the single issue of the case.

The plaintiff is what is termed a close corporation. Since 1868 its capital stock of 200 shares has been continuously owned by "descendants, or relatives or connections of descendants, of the three original incorporators." During its entire existence there have been no antagonistic or adverse elements among its stockholders, ten of whom have been chosen as directors. Frank B. Noyes was at the time of this controversy, and had been for a long time previous thereto, the duly elected president of the Company.

On April 10, 1914, the board of directors passed the following resolution:

> *Resolved*, That the President of the Company be authorized and directed to pay such dividends from the profits of the Company as will, in his judgment, be consistent with the policy of the Company to maintain reserves ample for all emergencies.

The defendant rests its sole defense upon a contention that there was no formal declaration of dividends as the

law requires, and that the resolution of the board of directors passed April 10, 1914, *supra*, is limited to a delegated authority to *pay* and not *declare* dividends.

If the language of the April resolution did no more than direct the president to pay dividends, then obviously the defense interposed would be invulnerable. However, we think it authorized the president to declare and pay dividends, and the defendant does not challenge the right of the directors to so delegate authority.

The resolution does not definitely fix the amount of the dividends except they shall be in such amounts as is "consistent with the policy of the company to maintain reserves ample for all emergencies." The execution of such authority inescapably involves a declaration of the amount of the same. The president was obligated to ascertain the profits of the corporation, and to maintain the policy of the company with respect to reserves and from this financial setup fix and pay the dividends proportionably payable from the cash on hand. The president was not simply an administrative official or disbursing officer of the corporation.

The president of the company for a long series of years had been granted by the board of directors express authority to manage the fiscal affairs of the same. The question of the declaration and payment of dividends was left by the resolution to his discretion and judgment, subject only to the limitations mentioned, and while the resolution omits the word "declare", the authority to do so is, we think, clearly apparent and deducible from the language of the same.

When the president ascertained in accord with the April resolution the sum available for distribution to stockholders he necessarily had to declare dividends varying in amount and payable to different stockholders. The board of directors delegated to him the authority to do this precise thing. The ascertainment of an available profit distributable to stockholders and its segregation into separate sums due individual stockholders involve more than an act of

payment. The board of directors intended no such limitation of the president's authority, and the language of the resolution warrants no such restricted construction.

In both plaintiff's and defendant's briefs Treasury Decision 4372 is cited, as follows:

> Section 213 imposes an excise tax upon the receipt of dividends, except those which were validly declared before the date of the enactment of the Act. A declaration of dividends payable periodically in the future will be regarded as void for the purposes of section 213 unless the declaring corporation at the time had sufficient earnings and profits accumulated subsequent to February 28, 1913, to enable it to pay all such future dividends so declared. No attempt to bind a corporation to pay future dividends out of anticipated earnings and profits will be recognized as a valid declaration for the purposes of that section.

It is conceded that the plaintiff is not precluded from a recovery under the above.

The purpose of Section 213 of the National Industrial Recovery Act (*supra*) is, as defendant states, to impose a tax upon the recipients of dividends subsequent to its passage, and to exclude a tax upon dividends *declared* before the date of the act. The payment of dividends subsequent to the date of the act which had been declared previously was admittedly nontaxable, and we can perceive no force in an argument predicated upon this fact.

There are a number of cases cited in the briefs. We withhold comment thereon, for in our opinion they do no more than disclose elementary principles of corporate law, and are decided upon the facts of the case cited. The issue in this case is to be determined upon the construction of the April 1914 resolution of the board of directors of the corporation. We think the defendant concedes this to be the fact.

Plaintiff is entitled to judgment for $23,245, with interest thereon as provided by law. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

ALLAN E. GOODHUE v. THE UNITED STATES

[No. 42943. Decided December 7, 1936]

On the Proofs

Income tax; contract for purchase of corporation stock; exchange of stock rights for stock, not an exchange of stock; profits taxable as capital net gain.—The plaintiff contracted in 1924 with a corporation of which he was an employee for the purchase of 1,000 shares of its stock for $82.50 per share, to be paid for from bonuses and other accruals to him outside of his salary, and to be delivered to him when fully paid for. In 1928, pursuant to a planned reorganization by the corporation, and after plaintiff had paid $40,240 on the stock contracted for, the corporation offered him for his rights under the contract the $40,240 that had been paid by him, with interest thereon amounting in all to $45,327.22, together with 2,935 shares of its new reorganization stock of a fair market value of $102,725, which offer was accepted by plaintiff, and the money and stock received by him in 1929, after the reorganization of the corporation had been effected. *Held*, that the stock contracted for by plaintiff in 1924 not having been fully paid for or delivered to him, he had not become the owner of it; that there was therefore no exchange of stock in the transaction in which he exchanged his rights under the contract for cash and reorganization stock of the corporation; and that his accounts being kept on a cash basis, his profit of $107,812.22 in the transaction was income taxable as capital net gain for 1929.

The Reporter's statement of the case:

Mr. Truman Henson for the plaintiff.
Mr. Guy Patten, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is, and at all times herein mentioned has been, a citizen of the United States and a resident of Briarcliff Manor, in the County of Westchester, State of New York. Plaintiff at all times herein mentioned kept his accounts and rendered his income tax returns upon the cash receipts and disbursements basis.

2. On February 23, 1924, plaintiff entered into a written contract with the Chicago Pneumatic Tool Company, a corporation of the State of New Jersey, whereby plaintiff agreed to buy from the Chicago Pneumatic Tool Company, and the Chicago Pneumatic Tool Company agreed to sell to plaintiff 1,000 shares of the capital stock of that company, and by the terms of the contract plaintiff agreed to pay to the Chicago Pneumatic Tool Company the sum of $82,500 for the shares. The contract further provided as follows:

> (2) ADJUSTMENTS: This agreed purchase price shall be increased by interest thereon from the date hereof to the date of closing, less proper credits for interest on payments on account, and shall be reduced by an amount equal to the dividends actually paid by the Company on a like amount of its outstanding stock subsequent to the date hereof, plus interest thereon.
>
> (3) INTEREST: The interest herein referred to shall be computed as of December 31st, of each year, excepting the year in which this transaction shall be closed, and for that year shall be computed as of the date of such closing. The rate used for each computation made as of December 31st, shall be the average rate paid by you on borrowed money during the year ending on that date. The certificate of your Auditor as to such average rate shall be conclusive hereunder. The rate shall be 5% per annum in case of all other computations hereunder.
>
> (5) DELIVERY: Said stock shall be delivered to me when the payments made by me hereunder shall be sufficient to pay for the same in full, after making the adjustments above provided for.

A true and correct copy of that contract is annexed to the stipulation herein as Exhibit A, and is by reference made a part hereof. At all times herein mentioned plaintiff was, and still is, an employee of the Chicago Pneumatic Tool Company.

3. From time to time after February 23, 1924, and prior to November 19, 1928, plaintiff paid to the Chicago Pneumatic Tool Company pursuant to the terms of the contract dated February 23, 1924, the sum of $40,240 on account of 900 of the 1,000 shares; and also paid $8,250 for the remaining 100 of said 1,000 shares provided for in the aforesaid contract, which 100 shares he sold prior to November 19,

1928, and reported the profit from the sale in his income tax return, assigning as the cost of the 100 shares the sum of $8,250.

4. On December 31, 1926, plaintiff entered into a further written contract with the Chicago Pneumatic Tool Company whereby he agreed to buy from that company, and the company agreed to sell to plaintiff, 1,000 additional shares of the capital stock of that company. By the terms of the contract plaintiff agreed to pay to the Chicago Pneumatic Tool Company the sum of $108,000 for these additional shares, and the company agreed to deliver the additional shares to plaintiff upon payment of the price, and agreed to credit plaintiff with amounts equal to all dividends paid by the company after December 31, 1926, upon a like amount of its outstanding stock.

A true and correct copy of the contract is annexed to the stipulation herein as Exhibit B, and is by reference made a part hereof. Nothing was ever paid by plaintiff on this contract.

5. Thereafter, and prior to November 19, 1928, the Chicago Pneumatic Tool Company made a plan of reorganization and the plan of reorganization was that the Chicago Pneumatic Tool Company would cancel the outstanding stock of the corporation and issue in exchange for each share thereof two shares of new Class "A" preferred no-par value stock and two shares of new Class "B" no-par value stock, and in connection therewith the corporation would cancel said contracts of the plaintiff and the contracts of other employees of the corporation who had entered into similar contracts with the Chicago Pneumatic Tool Company, in consideration of returning to the plaintiff and such others the entire amounts paid by him and them pursuant to his and the above mentioned contracts with interest thereon at 5%, and in further consideration of delivering to the plaintiff and such others a sufficient number of shares of such new Class "B" stock as, at a valuation of $35 per share therefor, would equal the difference between the amount the plaintiff and such others had agreed to pay for the old stock which he and they had agreed to buy, as aforesaid, and the product of the number of shares of the

old stock the plaintiff and others mentioned above had so agreed to buy, multiplied by $150 per share.

6. Thereupon the Chicago Pneumatic Tool Company made two offers in writing to plaintiff, both dated November 19, 1928, in respect to the foregoing contracts. These offers were identical in all respects, except as to the references therein to the purchase price of the stock under said respective contracts and the dates thereof. The offer in respect to the first mentioned contract provided as follows:

> By your contract with this Company dated Feb. 23, 1924, it was agreed that you should purchase from us 900 shares of our Treasury Stock at $82.50 per share, with certain adjustments and in certain instalments as provided in said contract.
>
> We are contemplating a change in our Capital structure which would result in giving to each holder of one share of the present stock four shares of new no par value stock, two shares of same being Class A convertible preferred stock entitled to cumulative dividends at the rate of $3.50 per share per annum, and redeemable at the Company's option at $65 per share, and the other two shares being Class B stock.
>
> We believe that this reclassification of the present stock would be for the advantage of the Company and of its stockholders, but before deciding upon such change, some definite provision should be made with reference to our outstanding stock sale contracts with employees.
>
> In consideration of the above, we hereby make you the following offer, namely:
>
> If we become duly authorized to issue said Class B stock and to issue the same for the purpose mentioned below, your said contract with us of Feb. 23, 1924, shall be deemed to be cancelled, it being understood and agreed that we shall, as soon as conveniently practicable thereafter, in consideration of such cancellation, repay to you all sums heretofore paid by you under said contract, with interest thereon from the respective payment dates to the date of repayment at the rate of five per cent. (5%) per annum, and further pay to you a sum equal to the difference between the $82.50 per share you agreed to pay for said 900 shares, and a present arbitrary sum of $150.00 per share therefor, such payment to be made in our Class B stock at $35 per share.

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If any fractional shares result from the above calculation, we will make cash adjustment with you on the basis of $35 per share.

If the above meets with your approval, please return the enclosed duplicate original thereof with your written acceptance thereon, thereby constituting a contract as above, effective as soon as the same is authorized, approved, or ratified by our Board of Directors.

Plaintiff duly accepted the foregoing offers immediately, and the corporation, by action of its Board of Directors, duly ratified the same on December 6, 1928. A true and correct copy of each of the contracts, so entered into and ratified, is annexed to the stipulation herein as Exhibit C and Exhibit D, respectively, and is by reference made a part hereof.

On November 19, 1928, and December 6, 1928, and at all times thereafter and until these agreements were performed, the Chicago Pneumatic Tool Company was able and willing to meet its obligations under the agreements; and at all the times mentioned above the fair market value of the obligations of the Chicago Pneumatic Tool Company under these agreements was $148,052.22.

7. Thereafter, on December 31, 1928, the Chicago Pneumatic Tool Company duly and legally amended its certificate of incorporation in accordance with its aforesaid plan and thereafter fully carried out the plan for a change in its capital structure and/or reorganization.

Thereafter, and pursuant to said contracts of November 19, 1928, the Chicago Pneumatic Tool Company paid to plaintiff the sum of $45,327.22 on January 9, 1929, same consisting of $40,240, the amount plaintiff had paid the corporation on the first contract aforesaid, and $5,062.22 interest thereon, and delivered to plaintiff 2,935 shares of the new Class "B" stock of that corporation on January 22, 1929. The fair market value of the 2,935 shares at the time same were delivered to plaintiff was $35 per share, or $102,725.

8. The net income of the plaintiff for the calendar year 1929, without including any amount on account of said money and shares of stock paid and delivered to the plain-

tiff by the Chicago Pneumatic Tool Company, as hereinabove in the next preceding finding hereof set out, was in the sum of $42,079.59.

9. On March 15, 1930, plaintiff filed his income tax return for the calendar year 1929, disclosing a net income of $47,141.81, included in which was the aforesaid sum of $5,062.22 received by plaintiff as interest. This return indicated a total tax liability for 1929 of $3,685.19, which plaintiff duly paid in four installments, as follows: $985.19 on March 15, 1930; $900 on June 15, 1930; $900 on September 11, 1930; and $900 on December 15, 1930.

A true and correct copy of the 1929 income tax return is annexed to the stipulation herein as Exhibit E, and is by reference made a part hereof.

10. Plaintiff did not include in his tax return for 1928 or 1929 any part of the sum of $102,725 set forth in finding 7 hereof, nor did he include any information or make any disclosure in his tax return for the year 1928 in respect to the foregoing transactions.

11. Plaintiff, by letter written by the Guaranty Trust Company of New York dated May 1, 1930, advised the Commissioner of Internal Revenue of the terms of the foregoing transactions between plaintiff and Chicago Pneumatic Tool Company, and requested a ruling by the Commissioner of Internal Revenue in respect to said transactions. A copy of the letter is attached to the stipulation herein as Exhibit E-1, and is made a part hereof by reference. Thereafter, on September 20, 1930, the Commissioner of Internal Revenue replied to that inquiry and advised plaintiff that he was not a stockholder of the Chicago Pneumatic Tool Company by virtue of the contracts which he held with that company and, therefore, Section 112 (b) (3) of the Revenue Act of 1928 was not applicable to the transactions outlined in the letter, and further advised plaintiff that the whole amount of said money in the sum of $45,327.22 and the fair market value of all of the shares of stock in the sum of $102,725, less only the sum of $40,240 paid by plaintiff to the Chicago Pneumatic Tool Company pursuant to the contract dated February 23, 1924, or the net sum of $107,812.22,

was income taxable to plaintiff as capital net gain for the calendar year 1929.

12. Thereafter, on March 4, 1931, plaintiff filed an amended income tax return for the calendar year 1929 in which, pursuant to advices given by the Commissioner, plaintiff reported a capital net gain of $107,812.22 in addition to the net income reported in his original return for that year, except that the sum of $5,062.22 reported on the original return as interest, as aforesaid, was included in the sum of $107,812.22 reported as capital net gain on the amended return. The amended return disclosed an additional tax of $12,685.77, which plaintiff paid, together with interest thereon in the sum of $737.84, on March 4, 1931.

A true and correct copy of the amended return is annexed to the stipulation herein as Exhibit F, and is by reference made a part hereof.

On May 13, 1931, there was refunded to plaintiff the sum of $7.97 on account of taxes paid by him for the year 1929.

13. Thereafter, on June 11, 1932, plaintiff duly filed his claim for refund for the year 1929 with the Collector of Internal Revenue in which he asked for the refund of $7,434.75 upon the ground that all money and stock received from the Chicago Pneumatic Tool Company, as aforesaid, was received in a nontaxable exchange pursuant to a plan of reorganization, and that the cash and stock received did not constitute taxable income to him in any amount in excess of the money received by him in the sum of $45,327.22.

A true and correct copy of the claim for refund is annexed to the stipulation herein as Exhibit G, and is by reference made a part hereof.

This claim for refund was rejected on a schedule dated March 8, 1933, and on or after March 8, 1933, the Commissioner of Internal Revenue sent to plaintiff by registered mail a notice of the total disallowance of the claim for refund.

On January 31, 1933, plaintiff filed an amended claim for refund for the year 1929, in which he asked for the refund of $13,423.61 upon the ground that any income received by

him from the Chicago Pneumatic Tool Company by reason of the money and stock received on account of that transaction was income for the year 1928 and that he received no income by reason of the transaction in the year 1929; and that, in the alternative and in any event the money and stock received by him from the company on and after January 9, 1929, were received in a nontaxable exchange pursuant to a plan of reorganization and that the same did not constitute taxable income to him in any amount in excess of the money received, to wit, $45,327.22, under the provisions of Section 112 (b)(3) and/or Section 112 (b)(1) of the Revenue Act of 1928.

A true and correct copy of the claim for refund is annexed to the stipulation herein as Exhibit H, and is by reference made a part hereof.

The claim for refund was rejected on a schedule dated April 11, 1933, and on or after that date the Commissioner of Internal Revenue sent to plaintiff by registered mail a notice of the total disallowance of said claim for refund.

14. If the Court finds that plaintiff realized income in the amount of $107,812.22 in the year 1929 by reason of the receipt by him in that year of stock of the fair market value of $102,725, and money in the sum of $45,327.22 from the Chicago Pneumatic Tool Company, and if the Court further finds that said stock and money were received by plaintiff upon an exchange described in Section 112 (b)(1), Section 112 (b)(3), or Section 112 (c)(1) of the Revenue Act of 1928, then plaintiff is entitled to recover from the defendant the sum of $8,540.50, together with interest.

15. If the Court finds that plaintiff realized no income in the year 1929 by reason of the receipt by him in that year of said stock of the fair market value of $102,725 and said money in the sum of $45,327.22 from the Chicago Pneumatic Tool Company, then plaintiff is entitled to recover from the defendant the sum of $14,206.40, together with interest.

16. Plaintiff is, and at all times herein mentioned has been, the owner of the claims sued upon and has not assigned or transferred the whole or any part thereof or any interest therein, and has at all times borne true al-

legiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

Plaintiff sues to recover a refund of income taxes paid for the calendar year 1929. The facts are stipulated.

Plaintiff was, during the period of this controversy, an employee of the Chicago Pneumatic Tool Company, a New Jersey corporation, and as such entered into a written contract with the corporation on February 23, 1924, to purchase 1,000 shares of its capital stock. This contract was obviously one granted by the corporation to employees to encourage them in acquiring stock in the same.

By the terms of the contract plaintiff agreed to pay the corporation $82.50 per share for the stock. Payments were to be made in the following manner: The corporation was to credit at least one-half of all bonus or similar payments in excess of plaintiff's salary upon the purchase price of the stock, and to also credit plaintiff's indebtedness for the stock with an amount equal to the dividends actually paid by the corporation on a like amount of its outstanding stock subsequent to the date of the contract. Plaintiff was to pay interest upon his indebtedness and receive credit with interest on payments made.

The contract provided in terms that the stock was not to be delivered until payments therefor "shall be sufficient to pay for the same in full, after making the adjustments above provided for." The parties admit that only 900 shares of stock are involved in this case, and that on November 19, 1928, the plaintiff had paid upon the purchase price for the same the sum of $40,240.

Some time prior to November 19, 1928, the corporation concluded to make a change in its capital structure and to accomplish same there was offered and accepted by plaintiff a proposition to cancel his contract of February 23, 1924, and receive for his rights to purchase the 900 shares of stock involved the sum of $45,327.22, subsequently paid January 9, 1929, in cash, i. e., the sum paid in with interest

thereon, and 2,935 shares of new class B stock which were issued and delivered to plaintiff on January 22, 1929.

It is conceded by the stipulation of facts that the fair market value of the class B stock of the corporation which plaintiff received January 22, 1929, was $102,725, i. e., $35 per share, and that this sum at least represents the difference in value between plaintiff's original contract to purchase stock, entered into February 23, 1924, and what he received as consideration for the cancellation of the same.

On March 15, 1930, plaintiff filed his income tax return for the calendar year 1929. This return disclosed a net income of $47,141.81 and a tax liability of $3,685.19. It did not include any part of the sum of $102,725 noted above. Plaintiff paid the tax of $3,685.19 during the year 1930, and on May 1, 1930, a letter advised the Commissioner of Internal Revenue of plaintiff's transactions with the corporation and asked for a ruling with respect to plaintiff's tax liability thereunder.

The Commissioner advised the plaintiff that he was not a stockholder of the corporation in 1928 and that there should have been included in his return the sum of $45,-327.22 received by him in cash for the cancellation of his contract of 1924 and the sum of $102,725, the value of his stock received in 1929, less only the $40,240 paid by him in cash prior to 1929, and that upon this basis $107,812.22 was income taxable as a capital net gain for 1929.

The plaintiff on March 4, 1931, adopting the Commissioner's ruling, filed an amended return for 1929 and paid an additional tax of $12,685.77 and $737.84 interest. Plaintiff's first refund claim was filed June 11, 1932, wherein a refund of a $7,434.75 overpayment of taxes for 1929 was claimed. This claim was denied by the Commissioner on March 8, 1933. On January 31, 1933, plaintiff filed an amended refund claim setting forth an overpayment of 1929 taxes in the sum of $13,423.61. This claim was rejected by the Commissioner April 11, 1933. The refund claims were timely and the court has jurisdiction.

Both of plaintiff's refund claims were predicated upon a contention that the stock received by plaintiff in 1929 "was received in a nontaxable exchange pursuant to a plan

of reorganization * * * and did not constitute taxable income to him in any amount in excess of the money received by him in the said sum of $45,327.22." The amended refund claim included the additional contention that any income received by plaintiff from the corporation was received in 1928 and plaintiff received no income in 1929.

The Revenue Act of 1928 (45 Stat. 816) now quoted is the applicable statute:

> SEC. 112. RECOGNITION OF GAIN OR LOSS.
> (a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.
> (b) *Exchanges solely in kind.*—
> * * * * *
> (3) STOCK FOR STOCK ON REORGANIZATION.—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.
> * * * * *
> (c) *Gain from exchanges not solely in kind.*—(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

In order to sustain the plaintiff's contention it is essential for the court to hold that the plaintiff was in 1928 a stockholder in the corporation, and that he exchanged his holdings for the new stock he received in 1929. We think the facts preclude such a holding. The plaintiff did not during the year 1928 do more than he was obligated to do under his contract with the corporation to maintain his right to eventually acquire stock in the corporation. It is true this right was one of greatly increased value over its original one and a substantial profit was available, and due to this

situation the plaintiff was offered in 1928 an opportunity to realize this gain. Without this offer the plaintiff was possessed of an executory contract in 1928, a right to acquire stock in the future. What happened in 1928 was an offer and acceptance of a proposition essential for the corporation to make to the plaintiff in order to effectuate its change of financial structure. The plaintiff on this date was indebted to the corporation in a sum in excess of $34,000 which must be liquidated before he received a single one of the 900 shares under contract of purchase. The stock of the corporation had advanced materially in price, and the right possessed by the plaintiff to purchase the same had advanced accordingly. In other words, the plaintiff's original investment had increased in value from an amount of cash invested to the market value of his right to purchase stock.

Plaintiff, who had adopted the cash and disbursements policy in keeping his accounts and making his tax returns, did not receive any portion of his capital gains in 1928. He received both cash and stock in 1929. What he received in 1928 was an express agreement to do what the agreement obligated the corporation to do when the corporation received authority to consummate the reorganization, and pay as agreed "as soon as conveniently practicable thereafter."

The corporation did not legally amend its certificate of incorporation until the last day of the last month of the year 1928, i. e., December 31, 1928, and manifestly plaintiff's rights in the premises were dependent upon this act. The contract of November 19, 1928, contained no provision obligating the corporation to pay the cash mentioned and deliver the 2,935 certificates of stock to the plaintiff contemporaneously with its effective date.

The plaintiff did not exchange stock for stock in either 1928 or 1929; as a practical business transaction he sold what may be and commonly is designated as "stock rights" and received for them cash and actual certificates of stock under a plan of reorganization adopted by the corporation granting the rights. For these rights he received payment in 1929 and realized the profit computed by the Commissioner upon his amended tax return in 1929. The plaintiff

possessed contingent paper profits in 1928 and actual ones in 1929. *MacLaughlin, Collector*, v. *Alliance Insurance Co.*, 286 U. S. 244.

An argument is advanced that the cost price of the stock received by plaintiff in 1928 was exactly the cost of the same in 1929 and hence no profit could be realized in 1929. The fallacy of the contention as we see it is the fact that the contract to purchase stock executed in 1928 fixed, among other things, the purchase price to be paid when the stock was issued at a later date, i. e., 1929, and when issued it represented a purchase price which did no more than absorb the profits of the purchaser. The purchaser was content to reinvest his capital gains by accepting the new stock issue of the employing corporation. It is true plaintiff agreed to do this in 1928, but the agreement was not consummated until 1929. No unconditional offer existed in 1928 which bound the corporation to issue and deliver its new stock to the plaintiff simultaneously with its acceptance. The plaintiff gained no *actual* increase in assets until 1929.

The petition will be dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

BALTIMORE EQUITABLE SOCIETY v. THE UNITED STATES

[No. 43150. Decided December 7, 1936]

On the Proofs

Refund of capital stock tax; exemption of insurance company from taxation; mutual insurance company.—The exemption from taxation granted mutual insurance companies by section 103 of the Revenue Act of 1932 was intended to apply only to companies that were purely mutual, and not to those only partly mutual.

Same.—The plaintiff, a fire insurance company doing business under both mutual and non-mutual plans, and consequently not a "mutual" insurance company within the meaning and exemptions of sections 103 and 204 of the Revenue Act of 1932,

was subject to taxation under said section 204, and was therefore exempt from the tax imposed by section 215 of the National Industrial Recovery Act of June 16, 1933, under its provision exempting from taxation thereunder any insurance company subject to the tax imposed by said section 204 of the Revenue Act of 1932.

The Reporter's statement of the case:

Mr. Stanley Worth for the plaintiff.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a fire insurance society without capital stock, organized as a voluntary association on February 17, 1794, and incorporated by an act of the General Assembly of the State of Maryland December 26, 1794, and having its principal office and place of business in Baltimore, Maryland. Its original charter provided for insuring houses from loss by fire and that the members should contribute equally to the losses and share the gains and advantages arising by reason of the covenants of insurance and the payments required from the subscribers or members. Every person insuring was required to deposit a certain sum which was to be returned at the expiration of the policy taken out with a proportionable dividend of the profits that had accrued, deducting losses and incident charges only.

2. In 1858, at a general meeting of the members of the society, a resolution was adopted authorizing plaintiff to write term insurance for a fixed premium for a period of less than seven years, and also permanent insurance. Policyholders holding such term insurance contracts were not entitled to any refund of premiums paid upon surrender or cancellation of such policies and as such were not entitled to share in any distribution of the earnings and profits of the company, nor did any such policyholders have any voice in the control or management of the company.

3. In 1865, at a general meeting of the members of the society, a resolution was adopted which provided for per-

Reporter's Statement of the Case

petual insurance to its members and did away with the former practice of issuing policies to members for periods of seven years. The plan of perpetual insurance which was inaugurated in 1865 has continued in effect ever since that date. Under the plan a member on payment of a fixed deposit is protected against partial or total loss by fire of the property insured, to the extent insured, perpetually or until such time as he ceases to be a member by reason of withdrawing his deposit. The entire amount of the deposit is returned to the member upon the cancellation of his policy whenever demanded.

4. By an act of the General Assembly of the State of Maryland approved May 3, 1882, plaintiff was authorized to insure wooden and frame buildings as well as stone and brick buildings by perpetual or permanent policies or for any period of time which might be agreed on between the parties at the time of effecting the insurance and for a deposit or a premium paid, but providing that only persons insured by deposits should have the rights or be subject to the liabilities of members of the corporation.

5. At a general meeting of the members of the Society on May 19, 1891, a resolution was adopted which provided *inter alia* for a dividend distribution to its members as soon as the "Reserved Surplus" amounted to 10 per cent of the aggregate amount of risks plus $60,000.00. It also provided that all losses and expenses of the Society should be paid out of income and, to the extent that income was insufficient, out of "Reserved Surplus", which was to be held for such purposes. No dividends have ever been paid by the Society.

The respective amounts of "Reserved Surplus" and perpetual and term insurance of the Society as at December 31 were as follows:

INSURANCE RISKS

Year	Reserved surplus	Perpetual	Term	Total
1931	$1,600,941.42	$17,439,522.00	$2,333,484.00	$19,773,006.00
1932	1,629,687.55	17,387,747.00	2,454,668.00	19,842,415.00
1933	1,683,277.91	17,309,514.00	2,401,968.00	19,711,482.00

Plaintiff duly filed its Federal Income Tax Return for the calendar year 1933, a copy of which is attached to the

stipulation, marked Exhibit A, and by reference made a part hereof.

6. The governing power of the plaintiff resides in its members, only perpetual policyholders being members with the right to vote.

7. On August 29, 1933, plaintiff filed with the Collector of Internal Revenue, Baltimore, Maryland, a paper headed "Return of capital stock tax for year ending June 30, 1933", which document showed, among other things, that it had neither common nor preferred stock but did have a surplus in the amount of $1,600,766.77 for which an exemption was claimed in the return and in a separate claim.

8. The Commissioner of Internal Revenue in a letter dated February 5, 1935, notified plaintiff that its claim for exemption from capital stock tax was denied for the reason that plaintiff was taxable under section 208 of the Revenue Act of 1932 for income tax purposes and not under Section 204 of said Act, and requested the filing of a completed capital stock tax return.

Plaintiff in a letter dated February 16, 1935, requested further information with respect to the Commissioner's letter of February 5, 1935.

9. Plaintiff under date of March 2, 1935, filed under protest a capital stock tax return for the taxable year ending June 30, 1933, which showed that the value of the entire capital stock of the company was the same sum as had been stated in its previous return to be the amount of its surplus, namely, $1,600,766.77, and that the tax thereon was $1,600. This amount of tax, together with interest and penalty of $286.93, a total of $1,886.93, was paid under protest to the collector on April 15, 1935.

10. On September 7, 1935, plaintiff filed a claim for the refund of the capital stock tax so paid and interest and penalty thereon. As a basis for the claim of this refund it alleged therein that it was taxable for income purposes under section 204 of the revenue act of 1932 and that the Court of Claims had held in a former case that it was not a mutual society within the meaning of the revenue act of 1932 and by reason thereof it was entitled to exemption from capital stock tax under section 215 (c) (2) of the N. I. R. A. This

claim for refund was rejected by the Commissioner of Internal Revenue on October 7, 1935.

The court decided that plaintiff was entitled to recover the sum of $1,886.93, with interest.

GREEN, *Judge*, delivered the opinion of the court:

This case turns on the question of whether the plaintiff is a "mutual" insurance company within the meaning of that word as used in the Federal taxing acts.

The plaintiff is a voluntary association organized for the purpose of carrying on a fire insurance business incorporated in 1794. Under its original charter the plaintiff was authorized to issue fire insurance to its members who contributed to the losses and shared in the gains equally. In 1858 the plaintiff was authorized to also write non-participating term insurance to non-members, and in 1865 the plaintiff was authorized to issue perpetual insurance to its members. Under this plan a member, upon payment of a fixed deposit, is protected against loss by fire perpetually, or until he ceases to be a member by withdrawing his deposit. Only perpetual policyholders insured by deposits have the right or are subject to the liabilities of members of the corporation. During the years 1931, 1932, and 1933, plaintiff's term insurance constituted approximately 12 per cent and its perpetual insurance 88 per cent of its outstanding insurance risks. In its Federal income tax return for 1933, plaintiff reported the "Kind of Business" in which it was engaged as that of a "Mutual Fire Insurance Co.", and computed its income and its tax liability thereon upon the basis of premiums written, with a technical deduction for the net addition to reserve funds required by law to be made within the taxable year.

On August 29, 1933, the plaintiff filed with the collector of internal revenue a paper headed "Return of capital stock tax for the year ending June 30, 1933", which document showed, among other things, that it had neither common nor preferred stock but did have a surplus in the amount of $1,600,766.77 for which an exemption was claimed in the return and in a separate claim. The Commissioner of Internal Revenue notified the plaintiff that its claim for ex-

emption of capital stock was denied for the reason that plaintiff was taxable under section 208 of the revenue act of 1932, and required the filing of a completed capital stock return. In compliance with this request, plaintiff, on March 2, 1935, filed under protest a capital stock return for the taxable year ending June 30, 1933, which showed that the value of the entire capital stock of the company was the same as had been stated in its previous return as the amount of its surplus and that the tax thereon was $1,600. This amount of tax together with interest and penalty, totaling $1,886.93, was paid under protest to the collector. Subsequently, plaintiff filed a claim for refund of the amount so paid. The refund claim having been denied by the Commissioner, this suit was brought.

A peculiar feature of the situation is that the tax in controversy is a tax on the value of capital stock. The stipulation recites that the plaintiff had no capital stock of any kind but that it did have a surplus in a considerable sum and that this surplus was taxed as the amount of its capital stock. The plaintiff, however, does not base its objections to the tax on this ground but, like the Commissioner, treats the surplus as being the equivalent of capital stock. Plaintiff's claim that it is exempt from the capital stock tax rests upon statutory provisions.

The capital stock tax was imposed by the National Industrial Recovery Act (48 Stat. 207) which provides:

> SEC. 215. (a) For each year ending June 30 there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.
>
> * * * * *
>
> (c) The taxes imposed by this section shall not apply—
>
> (1) to any corporation enumerated in section 103 of the Revenue Act of 1932;
>
> (2) to any insurance company subject to the tax imposed by section 201 or 204 of such Act; * * *.

Opinion of the Court

The revenue act of 1932 (47 Stat. 193, 225, 227) contained in section 103 thereof certain provisions for exemption from the corporation tax by "farmers' or other mutual * * * fire insurance companies."

Section 204 of the same act provides for the imposition of a tax upon the net income of insurance companies other than life or mutual.

Section 208 imposed a tax upon the income of mutual insurance companies other than life in the same manner as other corporations, with certain exceptions not material here.

In a case brought by this same taxpayer (*Baltimore Equitable Society* v. *United States*, 77 C. Cls. 566), the plaintiff claimed exemption from income taxes on the ground that it was a mutual company. In that case, after finding that about 10 per cent of the plaintiff's business was non-participating term insurance, this court held that the plaintiff was not a mutual company within the meaning of the words as used in the taxing statute and said:

> We think that when Congress provided the exemption set out in the statute it intended that it should apply only to companies that are purely mutual, and that consequently the plaintiff was subject to the corporation tax.

It is urged on behalf of the defendant that this decision is not binding in the case now before us for the reason that the court was then considering the application of different statutes. However this may be, the same reasoning applies. The statutes make no provision for apportioning the tax in accordance with the amount of business done under the mutual plan and the amount of term insurance, nor can we say that where the preponderance of business carried on is done under the mutual plan the company is mutual. Both the statutes under consideration in the case cited and those applicable to the instant case granted an exemption from the corporation tax to mutual companies. We do not think that this exemption was intended to apply

to companies that were only partly mutual for such companies would be merely mutual in some respects. The statute, in our opinion, was meant to apply only to companies that were purely mutual.

Having reached this conclusion, it follows that plaintiff was exempt from the tax imposed in the instant case. The portions of the statute which have been set out above show that the capital stock tax did not apply to insurance companies subject to the tax imposed by section 204 of the revenue act of 1932. This section applies to insurance companies other than life or mutual. Plaintiff was not a life insurance company and was not a mutual company within the meaning of the law as we construe it. It was consequently subject to the tax imposed by section 204 and exempt from the capital stock tax.

The argument for the defendant calls attention to the income tax return of plaintiff filed for the year 1933 in which it was stated with reference to the kind of business carried on, "mutual fire insurance", and counsel for defendant contend that the return was made up in accordance with the provisions of section 208 as applied to mutual fire insurance companies. Counsel for plaintiff insists that the return warrants no such conclusion. The findings include a reference to the return, a copy of which was attached to the stipulation entered into by the parties. The return showed a loss and we think it is immaterial whether the plaintiff intended it should conform to section 204 or section 208. If the plaintiff erred in making up its return, this was merely a mistake as to the law and is immaterial. It was not subject to tax under section 208 but under section 204 and is consequently exempt from the capital stock tax.

It follows that plaintiff is entitled to recover the amount of the tax, interest, and penalty paid, with interest thereon from the date of payment. Judgment will be entered accordingly.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

FRANK T. McCABE *v.* THE UNITED STATES

[No. 43315. Decided December 7, 1936]

On the Proofs

Army pay; officer ordered to proceed home to await retirement; permanent change of station; transportation of dependents.—An Army officer proceeding to his home under orders to proceed there and await retirement was making a permanent change of station, and was therefore entitled to transportation for his dependents.

The Reporter's statement of the case:

King & King for the plaintiff. *Messrs. John W. Gaskins* and *Fred W. Shields* were on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, Frank T. McCabe, is a major on the retired list of the United States Army.

2. On June 25, 1933, while stationed at Fort Francis E. Warren, Wyoming, plaintiff received telegraphic authority, and subsequently a printed copy of orders, issued by the War Department on June 23, 1933, which read as follows:

Special Orders No. 145 — War Department, Washington, June 23, 1933.

* * * * *

17. Major Frank T. McCabe, Infantry, Fort Francis E. Warren, Wyoming, for the convenience of the Government, will proceed to his home and await retirement. The travel directed is necessary in the military service. He may apply to the Quartermaster Corps for the necessary rail and Pullman transportation or he may travel by his own automobile and be reimbursed therefor at the rate of 4 cents per mile for the official distance, it having been administratively determined that payment at such rate is more economical and advantageous to the United States. Major McCabe will be allowed, in lieu

of subsistence, a per diem of five (5) dollars for the time required to perform the travel by common carrier. FD 26 P1–0622 A 153–3 and FD 26 P1–0620 A 153–4.

*   *   *   *   *

By order of the Secretary of War:

Douglas MacArthur,
General,
Chief of Staff.

3. At the time the above orders were received, plaintiff had residing with him at Fort Francis E. Warren, Wyoming, his dependents, consisting of his wife, a daughter, 17 years of age, and a son, 14 years of age. The plaintiff applied at the office of the Post Quartermaster and Finance Officer for transportation for his dependents, but was advised that the Government would not furnish transportation for them. Plaintiff accordingly supplied transportation for his dependents to his home in Newton, Massachusetts, the travel being undertaken by private automobile on July 5, 1933, and completed at a cost to the plaintiff of $250.00 for the transportation of his dependents, for which he has not been reimbursed.

4. On October 31, 1933, the plaintiff was placed on the retired list.

5. If entitled to transportation for his dependents from Fort Francis E. Warren, Wyoming, to Newton, Massachusetts, there is due plaintiff the sum of $256.05.

The court decided that plaintiff was entitled to recover.

Williams, *Judge*, delivered the opinion of the court:

The facts in this case have been stipulated as found. The only question involved is whether or not the plaintiff, when ordered from his station to his home to await orders, was directed to make a permanent change of station within the meaning of the statute, and, if so, was he entitled to the cost of the transportation of his dependents.

This question has repeatedly, in previous cases, been decided in favor of the plaintiff. *Beirnie S. Bullard, Admx.*, v. *United States*, 66 C. Cls. 264; and *Walter O. Henry* v. *United States*, 74 C. Cls. 527. There is no reason why

the plaintiff should have been put to the expense of bringing suit to recover what is unquestionably due him except the arbitrary action of the General Accounting Office in refusing to follow the law as it has been announced by the court in previous decisions.

Judgment is awarded to plaintiff in the sum of $256.05. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

HALSTED L. RITTER v. THE UNITED STATES

[No. 43333. Decided December 7, 1936]

On Defendant's Special Answer and Plea

Salary of impeached Federal Judge; jurisdiction of Senate in impeachment trials.—The provision of the Federal Constitution that the Senate should have the sole power to try all impeachments of Government officials was intended to mean that no other tribunal should have any jurisdiction in the trial of impeachment cases; and the courts are therefore without authority or jurisdiction to review or set aside the proceedings of the Senate in such cases.

Same; jurisdiction of Court of Claims.—The court has no authority or jurisdiction to review the proceedings or judgments of the United States Senate in a case of impeachment of a judge of a United States court.

The Reporter's statement of the case:

Mr. Carl T. Hoffman for plaintiff. *Mr. L. L. Robinson* was on the brief.

Mr. Assistant Attorney General James W. Morris for defendant. *Messrs. Paul A. Sweeney, John J. Pringle*, and *Henry A. Julicher* were on the brief.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff, who had been appointed a Judge of a District Court of the United States, brings this suit to recover the salary appurtenant to this office from April 1, 1936, to

and including April 30, 1936, in the sum of $833.33 which has not been paid to him. In his petition the plaintiff sets out the commission which he had received appointing him a District Judge signed by the President on February 15, 1929, and alleges that he performed the duties of his office until prevented from so doing by reason of impeachment proceedings against him. The petition shows that in March 1936 the House of Representatives of the United States adopted articles of impeachment against him which were duly presented to the Senate of the United States. The articles of impeachment are also set out and the action taken by the Senate thereon, showing that the plaintiff was adjudged "not guilty" on all of said articles except the seventh; that as to the seventh article the plaintiff had moved to dismiss the same on the ground that it constituted an accumulation and combination of all the charges in preceding articles upon which the Senate must first pass; that this motion was overruled by the Court of Impeachment; and that plaintiff answered denying the jurisdiction of the Senate to consider the seventh article, denied the allegations contained therein, and severally denied the allegations of paragraph 3 thereof.

The petition further shows that the United States Senate, after having acquitted the plaintiff on the first six articles of impeachment, proceeded to try him on the seventh article and found him guilty of the charge contained therein, and that thereafter a judgment was entered by the Senate ordering that the plaintiff be removed from his office as judge of a United States District Court.

It is further alleged in the petition that the attempted and purported removal of plaintiff from the office of Judge of the United States District Court by the Senate of the United States sitting as high Court of Impeachment was illegal, unconstitutional, and void, and did not constitute a removal from such office or deprive him of the emoluments thereof, for the reason that the charges made in the articles of impeachment do not constitute a high crime or misdemeanor within the meaning of the Constitution; that the seventh article of impeachment upon which the plaintiff was found guilty was but a restatement of portions of prior

articles as to which plaintiff was adjudged "not guilty"; that the Senate had no jurisdiction to try the plaintiff upon any of the articles of impeachment; and that after it had found the plaintiff "not guilty" on the first six articles, it had no jurisdiction to try the plaintiff upon the seventh article, which charged only matters which were contained in the prior articles.

For the reasons stated above, the plaintiff alleges that the judgment and conviction rendered against him by the Senate was an unconstitutional exercise of authority and is utterly void and of no effect.

The defendant in its special answer and plea states that at the time the petition was filed there was due and owing to the plaintiff the sum of $472.22 as salary for the first seventeen days of the month of April, and that subsequently there was tendered to the plaintiff a check in the amount of $472.22 drawn upon the Treasurer of the United States, and that defendant has at all times been ready and willing to pay this amount to plaintiff.

Further answering, the defendant submits that this court has no jurisdiction either to review or pass upon a judgment of impeachment rendered by the Senate of the United States which is the sole court for the determination of such a case; nor has it jurisdiction to entertain an action to try title to office.

In stating the issues in the case, we have not set out the articles of impeachment containing the charges made against the plaintiff, nor have we referred to the testimony introduced in support of them, for the reason that in the view which we take of the case it is not necessary to consider either of these matters.

It will be observed that the plaintiff bases his claim that the Senate acted without jurisdiction on two allegations: first, that the charges made in the articles of impeachment did not constitute impeachable offenses under the Constitution; and second, that having been acquitted on the first six articles, the Senate had no jurisdiction to try him under the seventh article which merely restated the matters charged in the previous articles. But this is not the question first to be determined in the case. Before we consider whether

the Senate acted within its jurisdiction in its proceedings, we must first decide whether this court has jurisdiction to review the action of the Senate and pass on this matter.

We think that when the provision that the Senate should have "the *sole* power to try all impeachments" was inserted in the Constitution, the word "sole" was used with a definite meaning and with the intention that no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment. [Italics ours.] The dictionary definition of the word "sole" is "being or acting without another" and we think it was intended that the Senate should act without any other tribunal having anything to do with the case. This would be the ordinary signification of the words and this construction is supported by a consideration of the proceedings of the Constitutional Convention and the uniform opinion of the authorities which have considered this matter.

It is not contended there is any provision in the Constitution which authorizes a review of the proceedings had and judgment rendered by the Senate in impeachment cases, but it is said the Senate acts as a high court of impeachment and that, being for the purposes of impeachment trials a court, if it acts without constitutional authority its judgments are a nullity. But what court is authorized to review its judgments and set them aside? The writers on constitutional law are unanimous in holding that there is none. Mr. Black, in his work on constitutional law, 3d Edition, pp. 137–138, after considering the proceedings on impeachment trials and the judgment rendered by the Senate, states:

> * * * there is no other power which can review or reverse their decision.

Professor Dwight in an article entitled "Trial by Impeachment", 15 American Law Register, 257–258, says, after commenting on the fact that in ordinary judicial proceedings we have courts rising one above another and a wide opportunity is given for rectification of mistakes of judgment:

> But in the grave questions decided on an impeachment, a single tribunal disposes of the question absolutely and for all time.

In an article appearing in 15 American Law Register 641, Judge Lawrence discusses at length the power of the Senate in impeachment cases and says (p. 660):

> But other high crimes and misdemeanors are just as fully comprehended as though each were specified. The Senate is made the sole judge of what they are. There is no revising court.

While the question now being considered has never been presented to a Federal Court in relation to the impeachment of a Federal officer, there are several decisions of the State courts relating to the finality of judgments rendered upon impeachment trials under constitutional provisions similar to those contained in the Constitution of the United States.

In *State* v. *Chambers*, 220 Pac. 890, in passing upon an incidental question arising in the impeachment trial of Governor J. C. Walton of that State, the Supreme Court of Oklahoma held that the legislature had exclusive jurisdiction over matters of impeachment.

The Supreme Court of Texas in two cases has held that the courts have no right to review collaterally a judgment of impeachment, and while in its opinion in the first case, *Ferguson* v. *Maddox*, 263 S. W. 888, 893, the language used is not entirely harmonious, its conclusion was:

> As to impeachment, it is a court of original, exclusive, and final jurisdiction.

The same rule was laid down in *Ferguson* v. *Wilcox*, 28 S. W. (2d), 526, 533.

In *People* v. *Hayes*, 143 N. Y. Supp. 325, 328, it appeared that a Governor who had been impeached had issued a pardon to an inmate of a State penitentiary. The validity of the pardon being disputed, a *habeas corpus* action was instituted on behalf of this inmate. In passing upon the validity of the impeachment, the court said with respect to the legislature:

> It is the exclusive and final judge of the occasion or time it shall select to impeach, and of the acts of the Governor it may specify for impeachment. This great power is political. History is replete with illustra-

tions of its use and abuses. It is reserved to the state for its preservation and the destruction of its enemies, and is beyond the control of every court except the court empowered to try the impeached and find him guilty or innocent.

Without considering at this point whether this statement is in all respects correct, it is clear that it is authority for the conclusion that no court can review the impeachment proceedings and set them aside.

When we consider the matter now before the court from a historical point of view it is quite evident that there was no thought at the time the constitutional provisions for impeachment were adopted of making the proceedings subject to review by the courts. In the constitutional convention it was proposed by several members that impeachments should be tried by a special court consisting of a judge or judges. Madison preferred the Supreme Court. But these propositions were rejected and while there was some suggestion in the consideration of the matter that the Senate might abuse its power, there was no intimation by anyone that the impeachment proceedings might be reviewed or set aside by the courts.[1]

The first impeachment proceedings were had not long after the Constitution had been adopted in Jefferson's Administration. John Pickering was a Federal District Judge whom historians say at times appeared on the bench in an intoxicated condition and indulged in language incoherent, irrational, and profane, and the proceedings carried on by him were extremely irregular. The House of Representatives voted articles of impeachment against him and the Senate proceeded to try the case. The Judge did not appear either in person or by counsel, but his son presented a petition alleging that when the acts charged against the Judge were committed he was insane and had been insane for two years and was now physically unable to attend the court. The Senate heard the evidence on insanity but nevertheless proceeded to try the Judge on the impeachment charges. He was found guilty and removed from office, notwithstanding

[1] See *The Growth of the Constitution in the Federal Convention of 1787* by William M. Meigs.

the fact that there was a provision in the law at the time for filling the place of a Judge unable to attend to his duties and, acting under this provision, the Circuit Court had in 1801 assigned one of its members temporarily to fill his place. After his conviction Pickering was adjudged insane by proper authority. The action of the Senate was characterized by the historian McMaster as "arbitrary", "illegal", and "infamous." We need not consider whether this language was justified. It is sufficient to say that notwithstanding the peculiar circumstances of the case no one at that time or since has suggested that the conviction of Judge Pickering might have been reviewed by the courts.

Judge Story in his work on the Constitution analyzes at great length the provisions with reference to impeachment and considers the objections made to the Senate as the trial body in such proceedings in preference to the courts. But while recognizing that the Senate might err or even abuse its power, he does not suggest that there would be any remedy.

If the impeachment proceedings were reviewable by the courts, a conviction would bring such serious results to the accused that in nearly every case where it so resulted the case would be carried to the superior tribunal. It has already been observed that in *People* v. *Hayes*, *supra*, the New York court referring to impeachment proceedings said:

> This great power is political. History is replete with illustrations of its use and abuses.

While the Senate in one sense acts as a court on the trial of an impeachment, it is essentially a political body and in its actions is influenced by the views of its members on the public welfare. The courts, on the other hand, are expected to render their decisions according to the law regardless of the consequences. This must have been realized by the members of the Constitutional Convention and in rejecting proposals to have impeachments tried by a court composed of regularly appointed judges we think it avoided the possibility of unseemly conflicts between a political body such as the Senate and the judicial tribunals which might determine the case on different principles.

Syllabus

In the case of *State of Mississippi* v. *Johnson*, 4 Wall. 475, 501, the Chief Justice said with reference to a hypothetical case where the House of Representatives had impeached the President and an injunction was sought to restrain the Senate from sitting as a court of impeachment—

> Would the strange spectacle be offered to the public world of the attempt by this court to arrest proceedings in that court?

implying that the Supreme Court would take no such action even though it was claimed that the Senate was acting unconstitutionally.

Our conclusion is that we have no authority to review the impeachment proceedings held in the Senate and decide whether the accusations made against the plaintiff were such that he could properly be impeached thereon, nor can we pass upon the question of whether his acquittal on the first six articles was a bar to prosecution under the seventh. In our opinion, the Senate was the sole tribunal that could take jurisdiction of the articles of impeachment presented to that body against the plaintiff and its decision is final.

Plaintiff's petition must be dismissed and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

CHARLES J. CASTLE v. THE UNITED STATES

[No. 42041. Decided January 11, 1937]

On the Proofs

Income tax; jurisdiction; suit on grounds different from those of refund claim.—It is well settled that a taxpayer can not recover in a suit not based upon a claim for refund, or where the grounds set forth in the refund claim are entirely different from those upon which the suit is based.

Imposition of both civil and criminal liability for violation of law.—The imposition of both civil and criminal liability for a violation of law is not inhibited by the Fifth Amendment to the Constitution; and a taxpayer is not relieved from criminal liability or prosecution for violation of the revenue laws as to

tax returns by payment of additional taxes claimed by the Commissioner of Internal Revenue or the imposition of an *ad valorem* penalty for such violation, nor does criminal conviction for the violation bar the imposition of such penalty therefor.

Ad valorem tax penalty an addition to the tax, and refunded on same terms.—An *ad valorem* tax penalty exacted of the taxpayer for violation of the law as to filing tax returns is in the nature of an addition to the tax, and can be refunded only upon compliance with the same conditions as are attached to the refunding of a tax.

Claim and suit for refund of penalty.—Section 3226 of the Revised Statutes with reference to the filing of claims for refund and suit thereon makes it clear that the law was intended to apply to penalties as well as to taxes.

Jurisdiction; Government's right to prescribe terms of suit for refund.—Even though the imposition of a tax penalty were in violation of the Constitution, this would not prevent the Government from prescribing the terms upon which it might be sued for refund thereof providing such terms be reasonable and afford a complete remedy to the party aggrieved.

Finality of decision of Board of Tax Appeals.—Where, upon appeal by plaintiff to the Board of Tax Appeals on a proposed deficiency, after the enactment of the Revenue Act of 1926, the Board, in accordance with a stipulation by the parties, entered its order of final determination of the taxes and penalties involved, and plaintiff failed to appeal therefrom, the decision of the Board became final and conclusive upon him.

Compromise settlement.—Where a compromise offer by plaintiff for settlement of taxes, penalties, and criminal charges against him was accepted by the Government and both parties complied with the terms of the agreement, it constituted a contract of settlement which may not be repudiated by plaintiff.

The Reporter's statement of the case:

Mr. Roscoe M. Ewing for the plaintiff. *Mr. Walter A. Bolinger* was on the briefs.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

Plaintiff is a citizen and resident of the City of Cleveland, Ohio, and filed no income tax returns for the years 1917 to 1920, inclusive. An investigation having been made by the defendant as to his liability for taxes, he executed

delinquent tax returns for the above mentioned four years, and on June 25, 1923, the plaintiff paid his tax liability in accordance therewith and certain penalties were imposed under section 3176 of the Revised Statutes and collected from him for his failure to file returns. Additional penalties were assessed for the failure and neglect of plaintiff to make returns for said years under the provisions of section 18 of the revenue act of 1916 and section 253 of the revenue act of 1918. June 19, 1923, plaintiff submitted an offer of compromise of the additional penalties in the sum of $5 for each of the four years, and this offer was accepted by the Commissioner. Subsequently, further investigation was made of plaintiff's income tax liability for the years 1913 to 1922, inclusive, which resulted in the assessment on March 3, 1924, by the Commissioner of Internal Revenue in the sum of $440,276.45 in additional taxes and penalties. Later plaintiff filed a claim for abatement of the $440,276.45 in taxes assessed against him and the Commissioner of Internal Revenue considered this claim and abated a portion of the tax for each of the years 1917 to 1922, inclusive. The plaintiff next took an appeal from this decision to the Board of Tax Appeals which, on June 29, 1927, entered an order determining the case in accordance with a stipulation entered into by the parties, and afterwards, the Commissioner having advised plaintiff of his tax liability for these years in accordance with the determination of the Board of Tax Appeals, the plaintiff on September 12, 1928, paid to the collector the sum of $122,467.95, being the balance of the outstanding assessments of taxes and penalties assessed during March 1924 against plaintiff for the years 1917 to 1922, inclusive.

In the meantime and on March 11, 1925, the grand jury of the northern district of Ohio, eastern division, returned an indictment against plaintiff charging in substance, in count one, that he had violated section 253 of the revenue act of 1921 with reference to his income tax return for the calendar year 1921. Count two of this indictment contained similar charges with respect to plaintiff's income tax return filed for the calendar year 1922. On June 15, 1925, the

plaintiff entered a plea of guilty to each of these two counts. On September 15, 1925, plaintiff was sentenced on count one to one year in the workhouse and fined $10,000, and on count two he was also sentenced to one year in the workhouse and fined $10,000. These sentences were to run consecutively. Plaintiff served in full the two sentences to the workhouse and paid the $10,000 fine imposed under count one of the indictment.

On July 23, 1928, the Union Trust Company, acting for the plaintiff, advised the collector that they were holding in escrow $88,121.47 available for payment to the collector of internal revenue upon the delivery of a receipt in full for all taxes, penalties, and interest for the years 1913 to 1922, inclusive, and the year 1924 due and payable by Charles J. Castle, together with a receipt in full for the payment of the $10,000 fine imposed against him under count one of the indictment previously referred to. This payment was also conditioned on the remission of the fine of $10,000 imposed under count two of the indictment and the dismissal by nolle prosequi of other criminal proceedings pending against him. On July 26, 1928, the attorneys for the plaintiff wrote a letter to the collector stating an offer in compromise in substantially the same terms. This offer of compromise was accepted on September 7, 1928, and the President issued an order remitting the $10,000 fine under count two on the condition that the $10,000 fine imposed under count one be paid and the plaintiff pay the government a sum of money equal to the total tax and penalty due and compromise the interest, all of which was accordingly done by the plaintiff, the total taxes and penalties being paid on September 12, 1928, and the indictment against him for the year 1924 was nolle prossed.

On September 4, 1930, the plaintiff duly filed claims for refund of taxes and penalties for the years 1917 to 1921, inclusive, in the following sums:

1917	$31,012.77
1918	374.95
1919	1,361.38
1920	4,444.14
1921	46,661.65

The claim for the year 1917 asserted that the tax and penalty for that year were barred from collection by the statute of limitations and that such collection was erroneous because a compromise had been previously effected as to the year 1917. The claims for the years 1918, 1919, and 1920, were identical except as to amounts claimed and asserted that penalties collected for those years were erroneous because of compromises previously effected in accordance with the decision of the Board of Tax Appeals and the statutes. The claim for the year 1921 referred to alleged errors in the method of computing the tax.

On January 30, 1931, the Commissioner disallowed these claims.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

There is no dispute as to the facts. The plaintiff failed to file income tax returns for the years 1917 to 1922, inclusive. In June 1923, plaintiff filed delinquent tax returns upon which taxes and penalties were assessed. Plaintiff paid these taxes and settled the penalties pursuant to an offer of compromise accepted by defendant. Later, and on March 3, 1924, the Commissioner assessed additional taxes and penalties against plaintiff in the total amount of $440,276.45. In the same year he was indicted for violation of the statute with reference to making income tax returns for the years 1921 and 1922. The indictment was in two counts and on June 15, 1925, he withdrew his plea of "not guilty" and entered a plea of "guilty." On September 15, 1925, he was sentenced on each count to one year in the workhouse and fined $10,000. After some proceedings with reference to the taxes and penalties last imposed upon him, plaintiff took an appeal to the Board of Tax Appeals. On June 29, 1927, pursuant to a stipulation of the parties, the Board entered an order fixing the amount of taxes and penalties against plaintiff for the years 1917 to 1922, inclusive, in the total sum of $122,467.95. Subsequently an agreement for compromise and settlement of the civil and criminal liabilities of plaintiff to the gov-

ernment was entered into between the parties under which the President made an order remitting the $10,000 fine under the second count of the indictment and further criminal proceedings against him were dismissed. The plaintiff complied with his part of the agreement by paying on September 12, 1928, all taxes and penalties assessed against him and the fine of $10,000 imposed under the first count of the indictment and making a settlement of the interest claimed by the government. Later, on September 4, 1930, plaintiff filed claims for refund of taxes and penalties for the years 1917 to 1921, inclusive, aggregating $83,854.89. These claims were rejected by the Commissioner on the ground that the taxes and penalties for these years had been closed by a stipulation and order entered by the Board of Tax Appeals and plaintiff now brings this suit to recover the amount paid. The argument on behalf of plaintiff, however, concedes that the plaintiff has no valid claim for a refund of the taxes paid and proceeds with the action only so far as it may relate to the recovery of penalties.

The contention of the plaintiff is that the penalties imposed for the years 1921 and 1922 were for the same offense for which he had previously been fined and imprisoned and consequently were collected in violation of the provision of the Fifth Amendment to the Constitution providing—

> Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

With reference to the years 1917 to 1920, inclusive, the plaintiff claims that in June 1923, defendant assessed and plaintiff paid income taxes and penalties for violation of the statutes with reference to making returns; that plaintiff made an offer to compromise the liability so created, which offer was accepted by the defendant and the amount so assessed was accordingly paid. The plaintiff also alleges that on September 12, 1928, further penalties for negligent failure to file returns were assessed against him for the years 1917 to 1920 in the total amount of $16,668.06, which sum was subsequently collected. Plaintiff contends as to these years 1917 to 1920, inclusive, that defendant having imposed penalties for failure to make a return of the taxes

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first assessed was prohibited from collecting further penalties on a later assessment for failure to file returns by reason of the inhibition of the Fifth Amendment as to double jeopardy and also because the plaintiff had made a compromise settlement of the taxes and penalties first imposed.

It is not necessary, however, to consider whether the claim of the plaintiff last stated with reference to penalties being twice assessed and collected is based on any legal foundation as the defense set up by the defendant applies to this claim equally with the claim of double jeopardy first made. But it may be said in this connection that the Commissioner doubtless acted upon the theory that as the penalties imposed were a certain percentage of the taxes assessed, the assessment of additional taxes warranted the assessment of additional penalties.

It will be observed that if the contention of plaintiff as to double jeopardy is sustained it would be impossible to enforce against a violator of the law a sentence for a criminal offense and also a penalty in a civil case for the same violation. The decisions of the courts upon the question so raised do not seem to be entirely harmonious, at least in the language used, but we think the cases cited in behalf of plaintiff involved a different question than is now before the court. *Ex Parte Lange*, 18 Wall. 163, was not a case where a civil penalty and a criminal punishment were imposed for the same offense, but one in which the accused was tried twice on the same criminal charge. In *Coffey* v. *United States*, 116 U. S. 436, the criminal offense involved the forfeiture of the property used in its commission and, unless a criminal offense had been committed, the property could not be forfeited. In the case at bar the penalty could be imposed without a criminal prosecution. In *United States* v. *Chouteau*, 102 U. S. 603, it was held that a compromise entered into with the Government released the defendant from liability for the offenses charged and further punishment for them. In *United States* v. *La Franca*, 282 U. S. 568, the decision seems to have been based largely on the special provisions of the act declaring

that a conviction under the National Prohibition Act should be a bar to prosecution under other acts, and it was finally concluded by the court to so construe the law that there would be no question about its constitutionality.

On the other hand, in *Hanby* v. *Commissioner*, 67 Fed. (2d) 125, the Circuit Court of Appeals for the fourth circuit sustained the position of the defendant in the case at bar, which is, as stated in *People* v. *Stevens*, 13 Wend. (N. Y.) 341, 342, that:

> It is undoubtedly competent for the legislature to subject any particular offense both to a penalty and a criminal prosecution; it is not punishing the same offense twice. They are but parts of one punishment; they both constitute the punishment which the law inflicts upon the offense. That they are enforced in different modes of proceeding, and at different times, does not affect the principle. *It might as well be contended that a man was punished twice, when he was both fined and imprisoned, which he may be in most misdemeanors.* [Italics ours.]

The Board of Tax Appeals has had before it two cases which involved the same question which is now raised in the case at bar. These cases were *Scharton* v. *Commissioner*, 32 B. T. A. 459, and *Mitchell* v. *Commissioner*, 32 B. T. A. 1093. In the last named case, the authorities were considered and reviewed at length and the Board held adversely to the contention now made by plaintiff. Two members dissented: one on the ground that the judgment rendered in the criminal prosecution against Mitchell was res adjudicata as to the civil case; the other member held that it was an absolute bar. The Board did not place its decision on the same grounds as were set forth in *Hanby* v. *Commissioner*, *supra*, but its decision is well reasoned.

We think it is not without weight in considering a case of this nature that Congress and the legislatures of the several States for more than a hundred years have shown by almost innumerable enactments that they did not consider the Fifth Amendment to the Constitution as preventing the imposition of both a civil and criminal liability for a violation of the law. This also seems to be the view of

learned commentators on this branch of the law. Paul and Mertens in their service entitled "Law of Federal Income Taxation", Vol. 5, par. 48.50, state the rule to be as follows:

> Payment of Tax and Payment of Ad Valorem Penalty Does Not Discharge Criminal Liability. A person does not escape criminal responsibility by paying additional taxes claimed by the Commissioner * * *. Nor does the imposition of an *ad valorem* penalty relieve him from a criminal prosecution. * * * Conversely, the criminal conviction does not bar the assessment of the *ad valorem* penalty. [Citing cases.]

To this we will add that the imposition of the penalty merely established a debt to the government. If the plaintiff failed to pay, nothing could be done that affected his person and it is difficult to see how he was "put in jeopardy of life or limb." We do not, however, find it necessary to pass on the issue of former jeopardy raised by plaintiff in view of our conclusion upon the affirmative defenses set up by defendant.

The defendant presents several defenses to the claim made by the plaintiff. One defense is that the basis of the suit was not stated in any claim for refund filed by the plaintiff.

No claim for refund was filed for the year 1922. The only claims for refund filed were for the years 1917 to 1921, inclusive. Plaintiff's contention that he was subjected to double jeopardy by the imposition of a penalty in addition to the tax was not asserted as a basis of the refund in any claim filed by him with the Commissioner. The claim for the year 1917 asserted that the tax and penalty for that year were barred from collection by the statute of limitations and that such collection was erroneous because a compromise had been previously effected as to the year 1917. The claims for the years 1918, 1919, and 1920, were identical except as to amounts claimed and asserted that penalties collected for those years were erroneous because of compromises previously effected in accordance with the decision of the Board of Tax Appeals and the statutes. The claim for the year 1921 referred to alleged errors in the method

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of computing the tax. That the taxpayer cannot recover on a claim for refund of a tax paid when the grounds set forth in the refund claim are entirely different from those upon which the suit is based is well settled. *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269. *Rock Island &c. R. R.* v. *United States*, 254 U. S. 141. In the last case cited it is said:

> If it [the government] attaches even purely formal conditions to its consent to be sued those conditions must be complied with.

It seems to be assumed by counsel for plaintiff that the acts of defendant's officials were unconstitutional, null, and void in that they imposed double jeopardy on the plaintiff. Conceding here for the sake of the argument that the penalty involved was imposed on the plaintiff in violation of the Constitution, this does not prevent the Government from prescribing the terms upon which it may be sued, providing these terms are reasonable and afford a complete remedy to the party aggrieved as they do in this case. Plaintiff having failed to comply with these terms can not recover. It is contended on the part of the plaintiff that the penalty exacted is not a tax and that the statute with reference to refunds of taxes unlawfully collected does not apply. We think this contention also is not well founded. In the case of *Bankers Reserve Life Co.* v. *United States*, 70 C. Cls. 379, the plaintiff set up that under the decision of the Supreme Court in *National Life Ins. Co.* v. *United States*, 277 U. S. 508, the section of the revenue act under which the tax in controversy was imposed was held to be unconstitutional and void and it was contended that the money which had been collected under it was not in legal contemplation a tax, but this court applied the taxing statutes nevertheless.

We are inclined to think the penalty is merely an addition to the tax. At all events, it can only be refunded upon compliance with the same conditions that are attached to the refunding of a tax. Section 3226 of the Revised Statutes with reference to the filing of claims for refund and

suit thereon makes it clear that the law was intended to apply to penalties as well as taxes. It reads:

> No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim * * * nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, * * *.

and section 3228 further provides:

> (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, * * * or in any manner wrongfully collected must * * * be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

This is not all that stands in the way of the recovery of the plaintiff. As above stated, the plaintiff took an appeal to the Board of Tax Appeals for a redetermination of the deficiency assessed against him by the Commissioner of Internal Revenue for the years 1917 to 1922, inclusive. His petition was filed subsequent to the enactment of the revenue act of 1926. When the cause came on for hearing the parties stipulated the deficiencies in taxes for these years and the amount of penalties, and in accordance with the stipulation, the Board, on June 29, 1927, entered its order of final determination that the plaintiff owed taxes and penalties for the years 1917 to 1922, inclusive, aggregating $122,467.95. Without setting out in detail the provisions of the statute, it may be said that it is plain that upon the failure of the plaintiff to take an appeal to the Circuit Court of Appeals the decision of the Board became final under section 1005 (a) (1) of the act of 1926.

There is still another reason why plaintiff cannot recover in this case.

On July 23, 1928, the Union Trust Company, acting for the plaintiff, advised the collector that they were holding in escrow $88,121.47 available for payment to the collector of internal revenue upon the delivery of a receipt in full for all taxes, penalties, and interest for the years 1913 to

1922, inclusive, and the year 1924, due and payable by Charles J. Castle, together with a receipt in full for the payment of the $10,000 fine imposed against him under count one of the indictment previously referred to. This payment was also conditioned on the remission of the fine of $10,000 imposed under count two of the indictment and the dimissal by nolle prosequi of other criminal proceedings pending against him. On July 26, 1928, the attorneys for the plaintiff wrote a letter to the collector stating an offer in compromise in substantially the same terms. This offer of compromise was accepted on September 7, 1928, and the President issued an order remitting the $10,000 fine under count two on the condition that the $10,000 fine imposed under count one be paid and the plaintiff pay the government a sum of money equal to the total tax and penalty due and compromise the interest, all of which was accordingly done by the plaintiff, the total taxes and penalties being paid on September 12, 1928, and the indictment against him for the year 1924 was nolle prossed.

The compromise offer made by the plaintiff, the acceptance thereof on the part of the defendant, and the compliance of both parties therewith constituted a contract of settlement fully carried out. The plaintiff availed himself of important favors which constituted full consideration for the contract, and is now precluded from repudiating it. Authorities to support this conclusion, we think, are unnecessary.

We concluded that three matters appear in the case, each of which is sufficient to prevent a recovery on the part of the plaintiff.

(1) The failure to file a claim for refund stating the grounds upon which suit is now brought;

(2) The judgment of the Board of Tax Appeals fixing the amount of taxes, penalty, and interest due from him;

(3) An executed contract of settlement.

It is therefore ordered that plaintiff's petition be dismissed.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

ART METAL CONSTRUCTION COMPANY v. THE UNITED STATES

[Nos. 42493 and 42548. Decided January 11, 1937]

On the Proofs

Income tax; deductible loss; depreciation of patents.—The depreciation in value of certain patents found to have occurred prior to the year 1927, and therefore not to be allowable as a deductible loss in the determination of taxable income for 1927 and subsequent years.

Addition to reserve for worthless debts; allowance and determination by Commissioner of Internal Revenue; burden of proof of error.—While the exercise by the Commissioner of Internal Revenue of his discretion in the allowance of additions to reserves for worthless debts is subject to review, his determination of a reasonable addition to a reserve for such purpose is not to be lightly set aside, and the burden of proof is on the plaintiff to show the determination not to be reasonable.

Addition to reserve for bad debts for one year not controlling for a subsequent year.—An allowance by the Commissioner of Internal Revenue of an addition to a reserve for bad debts for one year is not controlling for a subsequent year; each year must be judged on its own particular facts.

Credit for foreign taxes.—In order to substantiate credits for foreign taxes it is necessary to prove details of the law imposing the tax as well as the various factors fixing the date of accrual.

When tax accrues.—A tax accrues when all the events have occurred which fix the amount of the tax and determine the liability of the taxpayer to pay it.

Credit for foreign tax where liability therefor not determined until after taxable year.—Where the plaintiff paid a British income tax for the taxable year 1931–1932 based upon earnings for the calendar year 1930, and liability for which depended upon its continuance in business subsequent to the end of the year 1930, such tax did not accrue during the year 1930, and therefore could not be credited against plaintiff's income tax here for that year.

The Reporter's statement of the case:

Mr. William P. Smith for the plaintiff.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

Plaintiff seeks to recover $67,350.74, alleged overpayment of taxes for 1927, 1929, and 1930. The questions are (1) whether plaintiff sustained a loss on certain patents; (2) whether it is entitled to additional deductions on account of additions to its reserve for worthless debts; and (3) whether it is entitled to a claimed credit in 1930 on account of British income tax alleged to have accrued in that year.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a corporation organized March 24, 1913, under the laws of the Commonwealth of Massachusetts, having its principal office and place of business at Jamestown, New York.

On February 9, 1927, plaintiff acquired all the capital stock of the Postindex Company, Inc., a Massachusetts corporation organized in 1922, and thereafter owned said stock during the years herein involved.

The books of account of each of these corporations were kept on an accrual basis and the accounting period was the calendar year during the years in controversy.

2. On April 16, 1928, plaintiff filed a final consolidated corporation income-tax return for the calendar year 1927, reporting itself as parent and the Postindex Company as subsidiary and showing consolidated net income of $685,106.01 and tax amounting to $92,489.31. The tax was paid in installments as follows:

March 14, 1928	$25,000.00
June 15, 1928	23,000.00
September 14, 1928	23,000.00
December 13, 1928	21,489.31
Total	92,489.31

The return did not segregate the income and/or losses of plaintiff and its affiliated company, but loss of Postindex Company for a previous year not specified, in the amount of $191,527.16, was shown to have been deducted from the consolidated income for 1927.

3. By letter dated June 27, 1930, the Commissioner of Internal Revenue notified plaintiff that the determination of

Reporter's Statement of the Case

its tax liability for the periods January 1 to February 9, 1927, and February 10 to December 31, 1927, disclosed a net deficiency in tax in the amount of $41,072.40. The letter disclosed that the consolidated net income reported in plaintiff's final return for 1927 was made up as follows:

Art Metal Construction Co.	$957, 328. 41
Postindex Company, Inc. (loss)	80, 695. 24
	876, 633. 17
Postindex Company, Inc. (previous loss)	191, 527. 16
Consolidated net income reported in return	685, 106. 01

The letter further disclosed that the Commissioner had determined plaintiff's net income for 1927 as follows:

	Art Metal Construction Co.	Postindex Company, Inc.	Consolidated
Net income for calendar year 1927	$1, 015, 975. 41	$29, 906. 88 (loss)	
For Jan. 1 to Feb. 9, 1927	111, 339. 77	3, 277. 47 (loss)	
For Feb. 10 to Dec. 31, 1927	904, 635. 64	26, 629. 41 (loss)	$878, 006. 23

The Commissioner's determination showed additional tax to be assessed against plaintiff as follows:

Jan. 1 to Feb. 9, 1927	$4, 895. 06
Feb. 10 to Dec. 31, 1927 (consolidated)	36, 177. 34
Total	41, 072. 40

The additional tax, together with interest in the amounts of $733.12 and $5,418.18, or a total of $47,223.70, was assessed and was paid by plaintiff on October 2, 1930.

4. On October 10, 1930, plaintiff filed a claim for refund of the $47,223.70 additional tax and interest paid for 1927. The claim was based upon the failure of the Commissioner of Internal Revenue to allow as a deduction in computing the consolidated net income for 1927 the loss sustained by Postindex Company for the years 1925 and 1927. The Commissioner had, however, allowed the loss of Postindex Company for the period of affiliation, February 10 to December 31, 1927, in the amount of $26,629.41, as shown in finding 3 herein.

5. On November 6, 1931, prior to the Commissioner's action on plaintiff's claim filed for 1927 on October 10, 1930, plain-

tiff filed an amendment to the claim in which it set up numerous grounds, including claims for an addition to its reserve for bad debts for 1927, for the allowance of a loss alleged to have been sustained by Postindex Company on the sale of certain patents in 1927, and for the right to deduct from the consolidated income for 1927 the loss sustained by Postindex Company in said year prior to affiliation. In the amended claim it was contended, among other things, that the loss on patents originally claimed by the Costmeter Company in its consolidated return for 1925 to have been sustained by it in that year, which loss was later attributed to the Postindex Company for 1925 in determining plaintiff's consolidated income for 1927, was in fact a loss of Postindex Company for 1927.

6. Pursuant to a revenue agent's investigation, some of plaintiff's contentions in the amended claim for refund for 1927 were allowed, and the Commissioner of Internal Revenue redetermined the 1927 net income as follows:

	Art Metal Construction Co.	Postindex Co., Inc.	Consolidated
Net income for calendar year 1927	$1,011,874.57	$42,064.64 (loss)	
Segregated on basis number of days involved:			
Jan. 1 to Feb. 9, 1927	110,890.36	4,609.83 (loss)	
Feb. 10 to Dec. 31, 1927	900,984.21	37,454.81 (loss)	$863,529.40

Under date of May 23, 1932, the Commissioner issued a certificate of overassessment in the amount of $2,316.83, which amount of overassessment, plus interest thereon, was duly refunded to plaintiff. The balance of the amended claim, or $44,906.87, was specifically rejected. Among the contentions denied plaintiff were the alleged loss on the sale of patents, the right to deduct losses of the Postindex Company prior to affiliation in that year in computing consolidated net income for 1927, and the additional allowance to the reserve for bad debts.

7. Subsequently plaintiff filed another claim for refund for 1927 in the amount of $360.87 based on the right to deduct additional New York state franchise tax of $2,673.14 accrued November 1, 1927. The Commissioner, after the filing of these suits, reduced the consolidated net income for 1927 by

that amount and allowed the claim in full. The claim which is made in paragraph 5 of the petition in case no. 42493 accordingly is eliminated from this controversy.

8. April 15, 1929, plaintiff filed its consolidated corporation income-tax return for the calendar year 1928 with the Collector of Internal Revenue; this return included the income of the Postindex Company for the entire calendar year 1928. The consolidated income shown by this return was $850,541.95, of which the net income of the plaintiff amounted to $848,140.56, and that of the Postindex Company to $2,401.39. The tax shown due by this return amounting to $102,065.03 was duly paid, but no part of the 1928 tax is in issue in this suit. Subsequently the Commissioner redetermined the 1928 taxable net income of the plaintiff to be $913,273.66 and that of the Postindex Company to be $3,241.89, or a consolidated net income of $916,515.55. By reason of this adjustment a deficiency of $7,916.84 was duly assessed and paid. Pursuant to a revenue agent's supplemental report dated April 17, 1933, however, the Commissioner, having determined the net loss of the Postindex Company for the calendar year 1927 to be $42,181.57, pro rated 40/365ths thereof, or $4,622.63, as applicable to the period January 1 to February 9, 1927, prior to affiliation and applied same against the Postindex Company's redetermined 1928 net income of $3,241.89, as aforesaid, thus entirely eliminating same. As a consequence thereof there was refunded to plaintiff under Schedule No. 51163, dated September 29, 1933, $389.02 of the tax paid for 1928.

9. March 18, 1930, plaintiff filed its consolidated corporation income-tax return for the calendar year 1929 reporting consolidated net income of $1,170,953.32 and tax amounting to $123,364.15, which tax was paid in installments as follows:

March 18, 1930	$30, 842. 00
June 16, 1930	30, 842. 00
September 16, 1930	30, 840. 00
December 16, 1930	30, 840. 15

The return did not segregate income and/or losses of plaintiff and the Postindex Company, but a revenue agent's report dated November 30, 1931, shows same to have been com-

posed of net income of $1,110,790.68 for plaintiff and $60,162.64 for the Postindex Company.

10. Pursuant to a revenue agent's report dated November 30, 1931, and supplement thereto, dated January 30, 1932, the Commissioner redetermined the consolidated net income for the year 1929 at $1,223,733.62, assigning $1,163,363.70 as the net income of the plaintiff and $60,369.92 as that of the Postindex Company. The deficiency in tax resulting from the Commissioner's adjustments amounted to $5,753.59, and this amount, together with interest thereon of $657.46, was duly assessed and paid by plaintiff on February 11, 1932.

11. August 17, 1932, plaintiff filed a claim for refund of $6,640.69 of the tax paid for 1929 on the ground, among others, that so much of the alleged net loss of $115,959.51 by the Postindex Company for the nonaffiliated period, January 1 to February 9, 1927, as was in excess of the Postindex net income, viz, $3,241.89, for the calendar year 1928, should be deducted in computing that company's net income for the calendar year 1929. In a revenue agent's report dated April 6, 1933, the allowable net loss for the unaffiliated period, January 1 to February 9, 1927, was determined to have been $4,622.63, or $1,380.74 in excess of the net income of the Postindex Company for 1928. Plaintiff's claim of August 17, 1932, was disallowed on the ground that the loss of $111,349.68 alleged to have been sustained by the Postindex Company on sale of patents during the unaffiliated period was not proved; and that in any case no loss for that period could be applied against income for 1929, since the taxable period January 1 to February 9, 1927, was not one of the two taxable years preceding 1929 within the purview of Section 117 (b) of the Revenue Act of 1928.

12. April 15, 1931, plaintiff filed a final consolidated corporation income-tax return for the calendar year 1930, reporting consolidated net income of $542,828.31 and tax liability in the amount of $62,371.66 after taking a credit of $2,767.73 for income tax paid a foreign country. This tax was paid in installments as follows:

March 16, 1931	$20,000.00
June 16, 1931	14,124.00
September 16, 1931	14,124.00
December 15, 1931	14,123.66

The return did not segregate income and/or losses of plaintiff and its affiliated company.

13. March 18, 1933, plaintiff filed a claim for refund of $13,107.86 of the tax paid for 1930. This claim incorporated by reference plaintiff's letter of protest dated January 5, 1933, and a revenue agent's supplemental report dated February 27, 1933, showing an overassessment of $13,107.86. The letter and report are plaintiff's exhibits 34 and 45, respectively, which are made a part hereof by reference.

14. Under dates of June 22 and September 6, 1933, the Commissioner of Internal Revenue notified plaintiff that the claim for refund of $13,107.86 for 1930 would be allowed in the amount of $9,702.36 and rejected for the balance of $3,405.50 by reason of eliminating the foreign tax credit and the deduction from income of the balance of the foreign tax paid. The overassessment of $9,702.36, with interest thereon, was duly refunded to plaintiff.

November 23, 1933, plaintiff filed a claim for refund of $5,703.18, asserting by specific reference its demand for refund on account of the disallowance of part of the addition to the reserve for bad debts for 1930 claimed in the letter of protest referred to in finding 13 herein, and in effect reasserting claim for credit and deduction in that year on account of foreign tax paid. On the same day plaintiff filed its suit for $5,703.18 in this court in case no. 42548.

15. The additions to the reserve for bad debts and other relevant items as shown on plaintiff's books are as follows:

Year	Additions	Recoveries	Charges	Balance Dec. 31	Notes & accts. receivable	Net sales
1920	$39,941.77	$459.55	$18,803.54	[1] $21,597.78	$1,319,079.68	$6,204,335.56
1921	24,099.47	4,555.58	5,653.78	44,599.05	968,704.86	4,661,492.83
1922	23,661.54	1,799.77	8,265.49	61,794.87	1,034,230.81	4,606,383.64
1923	29,116.55	215.16	5,449.02	64,079.78	1,611,118.47	5,705,106.67
Returned to surplus			21,597.78			
1924	34,725.97	24.80	12,304.23	86,526.32	1,579,293.21	6,800,819.70
1925	33,028.69	1,090.84	7,912.67	112,733.18	1,545,821.44	6,479,272.51
1926	40,404.27	159.90	6,962.54	146,334.81	1,924,858.29	8,033,948.52
1927	38,591.82	28.12	7,840.24	177,114.51	1,591,533.09	7,549,519.35
1928	39,351.14	1,116.56	2,269.85	215,312.36	1,667,360.47	7,713,024.80
1929	42,632.92	1,295.17	2,566.22	256,674.23	1,877,286.90	8,386,522.11
1930	39,147.25	143.10	28,145.33	267,819.25	2,050,356.34	7,521,442.75

[1] Set up out of surplus.

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The additions to the reserve for bad debts as allowed by the Commissioner of Internal Revenue are as follows:

Year	Additions	Net charges	Balance Dec. 31	Notes & accts. receivable	Net sales
1920	$39,941.77	$18,343.99	[1] $21,597.78	$1,319,079.68	$6,204,335.56
1921	24,099.47	1,098.20	44,599.05	968,704.86	4,661,492.83
1922	18,387.51	6,465.72	56,520.84	1,034,230.81	4,606,383.64
1923	17,279.81	5,233.86	46,969.01	1,611,118.47	5,705,106.67
Returned to surplus		21,597.78			
1924	20,000.00	12,279.43	54,689.58	1,579,293.21	6,800,819.70
1925	20,000.00	6,821.83	67,867.75	1,545,821.44	6,479,272.51
1926	20,000.00	7,564.73	80,303.02	1,924,858.29	8,033,948.52
1927	11,680.38	7,812.12	84,171.28	1,591,533.09	7,549,519.35
1928	20,000.00	2,269.85	101,901.43	1,667,360.47	7,713,024.80
1929	20,000.00	1,271.05	120,630.38	1,877,286.90	8,386,522.11
1930	20,000.00	28,002.23	112,628.15	2,050,356.34	7,521,442.75

[1] Set up out of surplus $21,597.78.

Plaintiff's business is the manufacture of specialty metal products which are used primarily in the construction and completion of the interior of buildings. These products consist chiefly of metal doors and trim, elevator inclosures both of steel and ornamental bronze, bronze entrance doors, counters, ship furniture for battleships and cruisers, interior equipment for courthouses, tellers' windows, special cages for banks, and other similar building equipment. In the disposal of its products plaintiff in some instances dealt directly with the owner of the building in which these articles were being placed, but in most instances it dealt with the contractor or sub-contractor who was engaged in a particular piece of construction work. While in some instances the principal contractors, particularly on public works, were bonded to an extent generally sufficient to afford full protection to a sub-contractor in the position of plaintiff, in other instances such contractors were required to give only a performance bond which did not provide adequate protection to the sub-contractors. In further instances contractors had the privilege of lien rights, but those rights were sometimes waived to the prejudice of the sub-contractors, and in still further instances it was necessary to waive the lien rights in order to secure a given contract. As a result of the foregoing varying conditions the credit risk involved differed somewhat in the various states where work was being carried on by plaintiff.

Plaintiff made additions to its reserve for bad debts at the end of each year on the basis of one-half of one per cent of its net sales, whereas the Commissioner reduced those additions to the amounts set out in the above tabulation. The amounts thus determined by the Commissioner and allowed as deductions in computing net income constituted reasonable additions to plaintiff's reserves for bad debts.

16. The total income tax imposed by Great Britain for the year 1930–31 (ending April 5, 1931) amounting to $8,315.85 based upon the profits of plaintiff's London branch for the year 1929 was paid on March 4, 1931. Of this tax $5,492.96 was allowed by the Commissioner of Internal Revenue as a credit against income tax for 1929 due the United States, and the balance of $2,822.89 was allowed as a deduction in computing plaintiff's consolidated net income for 1929. Plaintiff had claimed the allowance of this British tax in its 1929 return.

The total income tax imposed by Great Britain for the year 1931–32 (ending April 5, 1932) in the amount of $7,933.60 based upon the profits of plaintiff's London branch for the year 1930 was paid February 5, 1932. No part of this tax has been allowed by the Commissioner of Internal Revenue, either as a credit against the income tax imposed by the United States or as a deduction for the year 1930, because the Commissioner treated it as an accrual in 1931.

17. In or prior to 1911 J. T. Quigley invented a clocklike device called a costmeter. About 1911 J. C. Liggett came in contact with Quigley and became interested in the work which he was doing. Liggett gave Quigley financial assistance in carrying on experimental work in connection with the device. September 28, 1911, Liggett caused the Costmeter Company of California to be organized, to which were transferred patents and patent applications covering the costmeter device. Stock was issued to Liggett for his efforts and assistance. In the meantime L. K. Liggett (a brother of J. C. Liggett) also became interested in the corporation and rendered financial assistance, thereby acquiring an interest in the corporation. The corporation had outstanding capital stock of $500,000, the greater part, if not all, of which was held by the Liggetts and Quigley, and

their families, approximately three-fourths being held by the Liggetts of which more than half was held by L. K. Liggett.

18. Prior to November 1914 there had been no commercial production of the device, but a great deal of experimental and development work had been done and the promoters of the enterprise were optimistic as to the possibilities of its commercial development. November 1914 the Costmeter Company of Massachusetts was organized by the stockholders of the Costmeter Company of California, and by a bill of sale dated October 22, 1915, all of the costmeter patents and patent applications were transferred to the Massachusetts corporation in consideration for the issuance to the stockholders of the California corporation of 3,000 shares of its capital stock of a par value of $100 a share, that is, $300,000, plus the assumption by the Massachusetts corporation of liabilities of the California corporation amounting to $49,315.61, the stock of the Massachusetts corporation being issued to the stockholders of the California corporation in proportion to their holdings therein. A small amount of other miscellaneous assets, consisting of the remaining assets of the California corporation, was transferred to the Massachusetts corporation in connection with the same transaction as follows: Cash, $302.87; accounts receivable, $339.10; plant and equipment, $6,747.61; inventory, $10,230.23.

On the basis of this transaction the patents and patent applications were set up the books of the Massachusetts corporation at $331,696.80. At the time of their acquisition by the Massachusetts corporation the costmeter patents had an average remaining life of seventeen years. At or about the date of acquisition of the assets of the California corporation by the Massaachusetts corporation the latter sold to three individuals 400 shares of its stock of a par value of $40,000 for $40,000 in cash. The three individuals who purchased the stock had not been connected in any way with the California corporation.

After the above transfer of assets and liabilities from the California corporation to the Massachusetts corporation the assets and liabilities of the latter were identical with

those of the former before the transfers, except as to the $40,000 in cash which had been received by the Massachusetts corporation from the sale of 400 shares of its capital stock.

19. In addition to the patent rights and applications for patents relating to the costmeter device, there was included among the assets transferred from the Costmeter Company of California to the Costmeter Company of Massachusetts on October 22, 1915, a registered application for a patent on the loose-leaf, visible file index, which was acquired by the Postindex Company, plaintiff's subsidiary, in September 1922. This patent is not involved in this suit, and the application therefor was not recognized as having any actual value at the time of its transfer in 1915, but it later developed into an asset of considerable value as hereinafter shown.

20. The Costmeter Company of Massachusetts began the manufacture of the costmeter device after it had acquired the assets of the California corporation. The device was designed to keep track of labor and overhead costs in factories. Each device or machine was an independent power unit which operated somewhat like a clock and a separate device was required for each employee. The machine was prepared so that a tape would pass through it and record thereon the time consumed on a given job as well as the money cost of the labor thereon. After a job was completed the tape would be taken out and pasted on cardboard or preserved in some other manner to show operating cost.

The devices were not sold but were rented at approximately 50 cents a month. They were manufactured and rented from time to time over the period from 1915 to 1920, but such operations were never commercially successful. They were not only cumbersome themselves but the same was also true of the tape-method of transferring and maintaining costs. In the meantime there were many changes in cost-finding methods and one or more new inventions of related types came into use. Over the period from 1915 to 1920 the gross revenue from all rentals of the device was only $14,018.25. January 3, 1920, the Massachusetts corporation ceased the manufacture of the device and none

has been manufactured since that time. Prior to December 30, 1925, the patents on the device had become worthless.

21. During 1919 the Costmeter Company of Massachusetts for the first time began development of the visible file index and in 1922 it was decided to separate that business from the costmeter business. Accordingly, a new corporation known as the Postindex Company was organized under the laws of Massachusetts in 1922.

September 15, 1922, the visible file index patent and all other assets except the patent rights upon costmeters and the costmeter inventory were transferred from the Costmeter Company to the Postindex Company. The consideration for the transfer was the issuance of all the common stock of no par value of the Postindex Company to the Costmeter Company.

From September 15, 1922, until December 30, 1925, the Costmeter Company retained the costmeter patents and inventory and also held all of the stock of the Postindex Company.

22. Between September 1922 and December 30, 1925, the Costmeter Company became indebted to the Postindex Company in the amount of $19,740.16, and on December 30, 1925, the Costmeter Company was indebted to L. K. Liggett on notes in the amount of $143,489.91 which he had previously loaned to it for operating expenses, plus $56,770.42 accrued interest.

December 30, 1925, the Costmeter Company transferred the costmeter patent rights and inventory to the Postindex Company in settlement of its indebtedness of $19,740.16 to the latter corporation. The Costmeter Company on the same day transferred all of the stock of the Postindex Company to L. K. Liggett in settlement of its indebtedness to him, and, having no other assets left, the Costmeter Company then liquidated on December 31, 1925. The Postindex Company set up the costmeter patent rights on its books at $19,640.16, the inventory being valued at $100.

23. The Costmeter Company filed a consolidated corporation income-tax return for the calendar year 1925, reporting itself as parent and the Postindex Company as subsidiary.

The return did not segregate the income and/or losses of parent and its affiliated company. The Costmeter Company claimed as a deduction, under schedule B, a loss of $162,-677.69. An alleged loss on the sale of the costmeter patents to the Postindex Company in consideration of the latter's cancellation of the former's indebtedness to it, amounting to $19,740.16, entered into the determination of this loss. The net loss reported in the return was $193,558.96. The Postindex Company had a net profit of $3,792.69 for that year, and the Costmeter Company a net operating loss of $29,782.65.

In computing the loss on the sale of the costmeter patents to the Postindex Company on December 30, 1925, the Costmeter Company used as cost of those patents the sum of $306,387.34. This figure did not represent a cash outlay, but was the adjusted balance of the original costmeter patent account amounting to $331,696.80 set up in 1915 upon organization of the Massachusetts corporation. The original account had been set up in an amount equal to the value attributed to the stock of the Costmeter Company, the California corporation, and for which the Massachusetts corporation had issued its capital stock of a par value of $300,000, as shown in finding 18 herein.

24. After December 30, 1925, L. K. Liggett owned all the common stock of the Postindex Company and the Postindex Company owned the costmeter patent rights, as well as the visible file index patents acquired in 1922. The officers of the Costmeter and Postindex companies were generally the same.

On February 7, 1927, the Postindex Company transferred the costmeter patents, parts, dies, equipment, and agreements to L. K. Liggett, by bill of sale for a consideration of $100. On February 9, 1927, L. K. Liggett sold all of the Postindex Company common stock to the plaintiff for a consideration of $200,000.

The court decided that plaintiff was not entitled to recover.

LITTLETON, Judge, delivered the opinion of the court:

These two cases were consolidated for the purpose of taking testimony and submission to the court, and arise as

a result of adverse action by the Commissioner of Internal Revenue on timely refund claims filed by plaintiff for income tax alleged to have been overpaid for 1927, 1929, and 1930.

Plaintiff contends, first, that a corporation later affiliated with it sustained a loss in 1927 on the disposition of certain patents, the unabsorbed portion of which should be carried forward and allowed as a deduction in computing consolidated net income for 1929. This question presents a rather involved set of facts but the essential elements upon which recovery depends involve a very narrow question of fact. Prior to 1911 one Quigley was developing a device called a costmeter, which was designed to record information necessary in the determination of labor and overhead cost in factories. In 1911 J. C. Liggett, after conferences with Quigley, became convinced that the device had commercial possibilities. Accordingly, September 28, 1911, Liggett organized the Costmeter Company of California and to that corporation were transferred the patents and patent applications on the costmeter device. In the meantime Liggett had interested his brother, L. K. Liggett, and perhaps others, in the proposition. The corporation had outstanding capital stock of the par value of $500,000, most, if not all, of which was held by the Liggetts, Quigley, and their families, more than three-fourths of the stock being held by the Liggetts of which more than a majority was held by L. K. Liggett. From 1911 to 1915 considerable experimental work was carried on for the purpose of perfecting the device.

In November 1914, the Costmeter Company of Massachusetts was organized and to that corporation were transferred in October 1915, all of the assets of the California corporation in exchange for stock of a par value of $300,000. The stock was apportioned among the stockholders of the California corporation on the basis of their holdings in that corporation. The Massachusetts corporation also assumed liabilities of the California corporation of approximately $49,000, and, in addition to the patents and the patent applications on the costmeter device, acquired certain miscellaneous assets having a value of seventeen or eighteen thou-

sand dollars. The patents and patent applications were entered on the books of the Massachusetts corporation at $331,696.80, which that corporation used as cost based upon the par value of stock issued for the various assets and the liabilities assumed. About the same time the California corporation sold stock of a par value of $40,000 for cash in the same amount to three individuals who had not been previously connected with either corporation.

The Massachusetts corporation then proceeded to manufacture some of the devices and at the same time continued its experimental and development work looking to its improvement and perfection. From time to time over the period from 1915 to 1920 machines were manufactured and placed with about six business concerns for use on a rental basis of 50 cents a month. The device was never a commercial success, losses being shown consistently in connection with the venture. In 1920 all manufacture of the device under the patents ceased and none was thereafter manufactured.

In the meantime a patent on a visible file index, which came to the Massachusetts corporation through a patent application in existence at the time of the 1915 transfer of assets, had developed into an asset of value. In 1922 it was decided to transfer the visible file index business to a separate corporation. Accordingly the Postindex Company was formed September 15, 1922, to which were transferred the patent on the visible file index and all other assets of the Costmeter Company of Massachusetts except the costmeter patents and inventory, the entire capital stock of the Postindex Company being issued to the Costmeter Company of Massachusetts. The Postindex Company seems to have been profitable from 1922 to 1925, whereas in or before 1925 the costmeter business had become a hopeless venture. However, the Costmeter Company had become indebted to the Postindex Company, as well as to L. K. Liggett. As a result the Costmeter Company on December 30, 1925, transferred the costmeter patents and inventory to the Postindex Company in settlement of its indebtedness to the latter corporation and on the same day the Costmeter Company transferred all of the stock of the Postindex Com-

pany to L. K. Liggett in settlement of its indebtedness to him. Having thus disposed of all its assets the Costmeter Company liquidated on the following day. L. K. Liggett continued to own all the stock of the Postindex Company from December 30, 1925, until February 9, 1927, when he sold this stock to plaintiff. Two days before this sale the Postindex Company sold the costmeter patents to L. K. Liggett for $100.

On the basis of this sale of the costmeter patents in 1927 by the Postindex Company to L. K. Liggett plaintiff claims a deductible loss measured by the difference between the alleged cost of $331,696.80, as entered on the books of the Costmeter Company of Massachusetts in 1915, less proper adjustment for depreciation, and the sale price of $100 in 1927. On this basis plaintiff also contends such part of the loss as was not used in determining taxable income for 1927 and 1928 should be carried forward and allowed as a deduction in computing net income for 1929. On the latter point the parties agree that in the event a loss was sustained plaintiff is correct in principle as to carrying forward such loss.

Plaintiff proceeds on the theory that these patents were acquired in 1915 at a cost measured by the par value of stock issued therefor and certain liabilities assumed, and that such stock had a fair market value equal to its par value. This claim is based largely on the proposition that certain shares of stock were sold for cash at par about the date of acquisition in 1915, whereas defendant strongly urges that the evidence is not sufficient to support the claimed value.

We do not find it necessary to determine the merits of these contentions for the reason that we are convinced, and have found as a fact, that the patents had become worthless long before the taxable years involved. This conclusion is fully supported by the record. However optimistic the views of the promoters of the enterprise may have been at its inception, these hopes had been destroyed prior to the time when the Costmeter Company of California made a transfer of the assets to the Postindex Company on December 30, 1925. After about five years of effort had produced

gross income from the device of only about $14,000, and the corporation had shown consistent losses therefrom over that entire period, manufacture ceased in 1920 and was not thereafter resumed. Whether the invention might have been a success if the war had not intervened and if better methods of doing the same thing had not been found is of no importance here. The controlling fact is that five years of effort, in addition to about five years of experimentation prior to the formation of the Costmeter Company of California, not only failed to produce successful results but demonstrated that financial returns could not be expected from the manufacture of this device.

The conclusion of the Costmeter Company of Massachusetts that the patents were worthless prior to their transfer to the Postindex Company is shown by statements appearing in the capital stock returns filed July 21, 1923, September 29, 1924, and July 24, 1925, wherein it is said that "The inventory is obsolete", and "Good will and patents have no value in view of the recurring deficits." The overwhelming weight of evidence to the effect that the patents had become worthless prior to December 30, 1925, more properly fixes the period within which any deductible loss was sustained than the sale in 1927 of the asset in question by a corporation to its sole stockholder for a nominal consideration. Since the loss had been sustained prior to 1927 it follows that it can not be taken into consideration in arriving at taxable income for 1927 and subsequent years.

Plaintiff next contends that the defendant erroneously reduced the amount of the allowable deductions in 1927 and 1930 on account of additions to its reserve for bad debts. This issue arises under the provisions of section 234 (a) (5) of the Revenue Act of 1926 and the corresponding provision of the Revenue Act of 1928, section 23 (j), which provide that in computing net income there shall be allowed as deductions "Debts ascertained to be worthless and charged off within the taxable year (or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); * * *."

The use of the reserve system in connection with deductions for worthless debts was first permitted in the Revenue

Act of 1921 and has been continued in substantially the same form. Prior to 1921 deductions for worthless debts could only be allowed when they were ascertained to be worthless and charged off. The new provision for the use of reserves constituted an important departure from the former revenue acts as far as worthless debts were concerned, and also a departure from the method employed with respect to other deductions, in that, by the use of the reserve method, deductions were thereafter allowable without regard to whether evidenced by closed and completed transactions. It is not without significance therefore that under the quoted provisions the additions to the reserve must be reasonable and allowable only in the discretion of the Commissioner. While the Commissioner's exercise of his discretion in this respect is subject to review (cf. *Blair* v. *Oesterlein Machine Co.*, 275 U. S. 220), his determination of a reasonable addition to a reserve is not to be lightly set aside. The burden is on plaintiff to show that the additions which the Commissioner has allowed to the reserve as deductions from income for the years involved are not reasonable. In this there is more than a mere presumption of the correctness of the Commissioner's determination. In addition, we are reviewing exercised discretion which has been confided in the Commissioner. Upon these principles we cannot say, upon this record, that there was any abuse of the discretion lodged in the Commissioner in the determination and allowance as a deduction of the additions to the reserves for 1927 and 1930, or that the additions for those years were other than reasonable. It is true that the addition allowed by the Commissioner for each of the three years preceding 1927, as well as for each of the three subsequent years, was $20,000, whereas the amount allowed for 1927 was only $11,680.38. Each year, however, must be judged on its own particular facts and an allowance by the Commissioner for a prior year does not bind him to approve the same allowance for a later year. *C. P. Ford & Company, Inc.*, v. *Commissioner*, 28 B. T. A. 156. The addition to the reserve claimed by plaintiff for 1927 was $38,591.82, whereas the total amount charged off by

plaintiff from 1921 to 1927, inclusive, amounted to only $54,387.97, or an average of $7,769.71 a year, and that does not take into account the amounts recovered in each of the years on account of debts previously charged off. The balance in the reserve as fixed by plaintiff at December 31, 1927, was $177,114.51, an amount more than three times the total charge-offs for 1921 to 1927, inclusive. When, therefore, the Commissioner allowed an addition for 1927 of $11,680.38 and showed a balance in the reserve at December 31, 1927, of $84,171.28, a showing of unusual circumstances would be necessary to require a conclusion that the Commissioner had abused his discretion in making such allowance and that a reasonable addition to the reserve had not been made. The evidence fails to justify such a conclusion.

A similar analysis could be made with respect to 1930 and a like conclusion must be reached. In further support of its position with respect to the latter year, with respect to which the Commissioner allowed an addition to the reserve of $20,000 when the charge-offs in that year were $28,145.33, plaintiff calls attention to the unusual conditions brought about by the economic depression and states that the losses sustained in the three subsequent years substantiate its contention. Although what happened in those three years would not be controlling as to the proper addition in 1930 and we have not considered the facts with respect thereto sufficiently material to be incorporated in the findings, what was shown, however, tends to confirm rather than refute the accuracy of the allowance as made by the Commissioner. The actual charge-offs for 1931, 1932, and 1933 were $13,941, $53,049.03, and $23,204.27, respectively. Even after these charge-offs a substantial amount existed in the reserve at the end of 1933 and a substantial part of the charge-offs was with respect to business done for 1930 and prior years, as to which years reserves had been built up, even on the Commissioner's allowance, much in excess of the charge-offs for those years. The further argument is advanced that the plaintiff was not always fully protected through the char-

acter of bonds taken out by the party through whom it was doing work, but it should be borne in mind that protection of this character is something in addition to that ordinarily found to which a party may have recourse in the event of the failure of the debtor. In many instances, therefore, plaintiff had double protection against bad-debt losses and the relatively small losses sustained of that nature may reasonably be attributed in part to that source.

The record we think confirms rather than discredits the reasonableness of the additions to the reserve as allowed by the Commissioner of Internal Revenue.

The final question is whether plaintiff is entitled to a credit against its tax for the calendar year 1930 on account of income tax paid to the British Government February 5, 1932, on earnings of its London branch for that year. Plaintiff kept its books and rendered its returns on an accrual basis and contends that the tax in question accrued at the end of 1930. The meager facts on this point are not sufficient to justify the conclusion that the taxes accrued on a date other than that fixed by the Commissioner. In order to substantiate credits for foreign taxes, it is necessary to prove the details of the law imposing the tax as well as the various factors fixing the date of accrual. *Niles Bement Pond Co.* v. *United States*, 281 U. S. 357; *Law of Federal Income Taxation*, Paul and Mertens, Vol. 3, p. 212. Some of these essential elements are not shown. Accepting as true, however, the facts as used by both parties, some of which are not in the record, we are of opinion that the Commissioner's action was correct.

Prior to 1932 the Commissioner had proceeded on his ruling that British income tax assessable for the British year of assessment, April 6 to April 5 of the succeeding year, on the average income of "three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade had been usually made up", is properly accruable as at the end of the third year in the average, and where the tax for the British year of assessment is based on the income of the

preceding year, the tax accrues as at the end of such preceding year. G. C. M. 5971 (C. B. VIII–1, p. 182). However, on February 4, 1932, it was held in *Columbian Carbon Co.* v. *Commissioner*, 25 B. T. A. 456, that such tax did not accrue at the end of the year preceding the year of assessment but rather in the year of assessment, since it appeared that liability for the payment of such British taxes is dependent upon whether the taxpayer continues in business during the year of assessment. As a result of that decision the Commissioner revoked the prior decision referred to and issued G. C. M. 10613 (C. B. XI–1, p. 173), in which he made a ruling consistent with that decision of the Board. Plaintiff filed its return for 1930 on the basis of the earlier decision but in his audit the Commissioner made adjustments to conform to the later decision which was then in force, thereby disallowing the entire deduction for 1930 of the tax for the British year of assessment, April 6, 1931, to April 5, 1932, which was based on the earnings of plaintiff's London branch for the calendar year ended December 31, 1930, and which was paid February 4, 1932.

A tax accrues when all events have occurred which fix the amount of tax and determine the liability of the taxpayer to pay it. *United States* v. *Anderson*, 269 U. S. 423. On the basis of the facts set out in the decision of the Board in the *Columbian Carbon Co. case*, *supra*, and in the rulings of the Commissioner heretofore referred to, which facts the parties seem to have accepted as a basis for their positions, it appears that at the end of 1930 all events had occurred necessary for a determination of the amount of tax but that plaintiff's liability for tax was dependent on the happening of an event subsequent to the end of that year, namely, its continuance in business. Under such circumstances the basis for accrual did not exist until after the end of the calendar year 1930. The petitions must be dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Syllabus

MARY BATES FITZROY, AS SOLE SURVIVING ADMINISTRATRIX OF THE ESTATE OF JOHN DOUGLAS BATES, DECEASED, v. THE UNITED STATES

[No. 42626. Decided January 11, 1937]

On the Proofs

Legacy tax; administration period for estate under Massachusetts law; extension of period.—The two-year period for administration of an estate under the Massachusetts law was not extended by the fact that heirs unknown at the time of the appointment of an administrator without surety did not until later enter their appearance and consent to such appointment.

Right of heirs to distribution of estate; voluntary advance distribution by administrator; distribution when litigation pending.—Under the Massachusetts law the administrator of an estate could, prior to a decree for distribution, voluntarily make distribution at his own risk, or require the distributees to secure him against the risk, but there was no absolute right in the heirs to distribution until there was a decree or order by the court for distribution; and generally heirs have no absolute right to distribution until the determination of any pending litigation or other matters affecting the amounts to which they are respectively entitled.

Distribution of estate; when distributive shares in "possession or enjoyment" of heirs.—When, in the course of the administration of an estate, the heirs had the right to demand of the administrator payment or possession of their shares of the estate, such shares were then in their "enjoyment" within the meaning of the act of June 13, 1898, providing for taxation of distributive shares of estates taking effect "in possession or enjoyment" after the death of the decedent.

Same; refund of taxes on contingent beneficial interests not vested prior to July 1, 1902.—Where the heirs of an estate had not, prior to July 1, 1902, received, and were not yet entitled to demand of the administrator, their distributive shares of the estate, they were not yet in possession or enjoyment thereof, and taxes thereon exacted by the Government under the act of June 13, .1898, were therefore refundable under the provisions of the act of June 27, 1902, for refund of taxes collected under the 1898 act on contingent beneficial interests not vested prior to July 1, 1902, and were recoverable by suit following rejection of claim for refund filed pursuant to the act of March 30, 1928, extending the time for the filing of such claims.

The Reporter's statement of the case:

Lyon & Lyon for the plaintiff.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is the sole surviving administratrix of the estate of John Douglas Bates, who died on May 14, 1900, being then a resident and citizen of Suffolk County, Massachusetts. The decedent left a will which, however, was denied probate because it had been executed by him prior to his marriage. The decedent left surviving him, as the only next of kin and heirs at law known at the time of his death, his widow, Mary Bates, and George P. Bates, Edward C. Bates, Caroline T. Bates, and Mary D. Bates, all cousins of said decedent.

2. On June 14, 1900, the Probate Court within and for Suffolk County, State of Massachusetts, same being the Court having exclusive jurisdiction over the estate of said decedent, entered its order appointing the plaintiff herein and Edward C. Bates and Gordon Prince as administratrix and administrators, respectively, of the estate of John Douglas Bates, and on the same day issued to the above-named persons letters of administration. Each of the persons above named gave bond without surety, which bonds were approved by the Judge of the Probate Court on June 14, 1900, after all of the above-named persons as next of kin and heirs at law had certified to the Court their consent to the giving of bonds without surety and after due notice to the creditors of the estate. All of the above-named persons and all other persons hereinafter mentioned as interested in the estate, or claiming to be so interested, were of full age and legal capacity at the time of the appointment of the administratrix and administrators. The appointment of the above-named persons as administrators has never been revoked or modified by the Court and is still in force, except that Edward C. Bates and Gordon Prince have both deceased.

3. Thereafter, during January 1901, the administrators learned for the first time that the decedent, John Douglas

Bates, had left surviving him two other cousins, namely, John Douglas Bacon and Susan Maria Johnson, in the same degree as those already named. On February 1, 1901, John Douglas Bacon and Susan Maria Johnson entered their appearance as heirs at law and next of kin of the decedent and their consent to the appointment of the administrators without surety, in the Probate Court, and thereafter each participated in the distribution of the estate in equal degree with the cousins first above named.

4. John Douglas Bates died seized and possessed of personal property of the gross value of $950,447.75 subject to deductions for debts and charges against his estate amounting to $81,294.80. All these debts and charges were paid by the administrators, leaving a net personal estate remaining in the possession of the administrators amounting to $869,152.95, of which $360,000 was distributed by them on March 2, 1901, by order and decree of the Probate Court within and for Suffolk County, State of Massachusetts, one-half to Mary Bates, the widow, and one-half to the cousins of the decedent, George P. Bates, Edward C. Bates, Caroline T. Bates, Mary D. Bates, John Douglas Bacon, and Susan Maria Johnson, in equal parts.

5. Thereafter, on March 4, 1901, the administrators filed their Legacy Tax Return covering the aforesaid distributions of March 2, 1901, with the Collector of Internal Revenue for the Third District of Massachusetts, under the provisions of Sections 29 and 30 of the Act of June 13, 1898 (30 Stats. L. 448). This return disclosed a tax due thereon of $7,712.34 which was duly paid by the administrators to the collector on March 4, 1901.

6. Thereafter, and subsequent to July 1, 1902, the remainder of the net personal estate of the decedent, amounting to $509,152.95, was distributed by the administrators, one-half to Mary Bates, the widow, and one-half to the cousins of the decedent, George P. Bates, Edward C. Bates, Caroline T. Bates, Mary D. Bates, John Douglas Bacon, and Susan Maria Johnson, in equal parts.

7. On March 7, 1903, the administrators filed with the Collector of Internal Revenue a second Legacy Tax Return covering the last mentioned distributions, which return dis-

closed a tax due thereon of $10,952.70, of which $10,907.70 was paid by the administrators to the collector on March 12, 1903, and $45 was abated on August 27, 1903, making a total of $18,620.04 paid by the administrators as legacy tax.

8. On July 7, 1915, the attorneys for the administratrix filed a paper purporting to be a supplemental claim for refund, but no evidence was introduced showing that a prior claim for refund was filed and the Commissioner rejected this claim as barred.

9. On April 7, 1928, R. B. H. Lyon, of the firm of Lyon & Lyon, attorneys for the estate, filed a claim for refund for $18,665.04 with the Collector of Internal Revenue for the Third District of Massachusetts, in which he asked for the refund of the above-mentioned amount upon the following grounds:

"That the tax was erroneously assessed and illegally collected by reason of the decisions of the Supreme Court of the United States in the case of *United States* v. *Jones; McCoach* v. *Pratt* (236 U. S., Page 562) and the tax is now refundable to claimant."

This claim for refund was rejected.

10. On June 7, 1902, Robert Cushman, an attorney, entered an appearance in the Probate Court in the matter of any subsequent proceedings in the estate of John Douglas Bates.

Thereafter, on June 18, 1902, Edwin G. Bates filed his petition in the above-mentioned Probate Court, in which he asked to share in the distribution of the then remaining undistributed portion of the estate in equal degree with the aforenamed six cousins of the decedent. This petition was disallowed by decree of the Probate Court on September 30, 1902, whereupon an appeal was taken by the petitioner to the Supreme Judicial Court of the State of Massachusetts, a court having appellate jurisdiction of this matter, which court, on November 13, 1902, affirmed the action of the Probate Court in dismissing the petition of Edwin G. Bates.

The court decided that plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

John Douglas Bates, a citizen of Massachusetts, died May 14, 1900. Administrators were duly appointed for his

estate and pursuant to the act of June 13, 1898, made two legacy tax returns covering distributions of the estate property and paid the tax imposed by this statute. The last distribution was not made until after July 1, 1902, and $10,-907.70 tax was paid by the administrators on March 12, 1903. On April 7, 1928, plaintiff, as sole administratrix of the estate, filed a claim for refund of all of the legacy taxes paid, but this suit is brought only to recover the tax paid on the last distribution to the next of kin on the ground that it was erroneously assessed and illegally collected. The validity of the tax depends on several statutory provisions.

Section 29 of the Spanish War Revenue Act, approved June 13, 1898 (30 Stat. 448, 464), provides:

> Sec. 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, * * *.

The other provisions of this section need not be set out, as there is no controversy over the amount of the tax if it was properly levied. On April 12, 1902, an act taking effect July 1, 1902, was approved (32 Stat. 96) which repealed the provisions of the act of June 13, 1898, and the statute of June 27, 1902 (32 Stat. 406), authorized the Secretary of the Treasury to refund "so much of said tax [collected under the act of June 13, 1898] as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two."

By the act of March 30, 1928 (45 Stat. 398), the time for presenting the claim for refund was extended to six months after March 30, 1928, "where and when and only when it be found and determined that such taxes were collected upon

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the erroneous interpretation of the law passed upon and condemned by the United States Supreme Court in decisions rendered in the case of United States against Jones, administrator,[1] and in the case of McCoach, collector, against Pratt,[2] * * *."

The plaintiff claims that the tax in controversy was collected "on contingent beneficial interests" which had not "become vested prior to July 1, 1902", and is consequently refundable. This constitutes the sole issue between the parties to the action. In determining this issue it becomes necessary to consider the statutes of Massachusetts applicable to the case and the construction given them by the courts of that State as well as the construction of the Federal statute, set out above, by the Supreme Court and lower Federal courts.

Under the laws of the State of Massachusetts, the period of administration was two years from the date of granting letters of administration. Conversely, an administrator could be held to answer to an action begun by a creditor within this period. On June 14, 1900, all of the then known heirs having consented and notice having been given to the creditors of the estate, the administrators were appointed without bond. On January 1, 1901, the administrators learned for the first time that there were two other heirs in the same degree as those already made known, and on February 1, 1901, these additional heirs entered their appearance as next of kin to the decedent, gave their consent to the appointment of administrators without surety in the Probate Court, and thereafter each participated in the distribution of the estate in equal degree with those who had first given their consent. Upon these facts it is contended that the administration period did not legally begin under the laws of Massachusetts until all of the distributees or beneficiaries of the estate had consented to the administrators giving bond without surety, which date was February 1, 1901; that the two-year period of administration did not expire until after July 1, 1902, and the creditors could bring

[1] 236 U. S. 106.
[2] 236 U. S. 562.

suit against the administrators within the last named period. It is urged that the Probate Court had no authority to approve the bond upon consent of only part of the heirs and that the bond did not become valid until the consent of the remaining heirs had been obtained, with the result that the shares or interest of the heirs remained contingent and were not vested within the prescribed period. In support of this argument the plaintiff cites *Abercrombie* v. *Sheldon*, 8 Allen 532, 533, 534, and *Everett Trust Co.* v. *Waltham Theatre*, 267 Mass. 350, 363.

In the *Abercrombie case, supra*, no notice was given to creditors and basing its ruling on this fact the court held that the statute of limitations did not run against the creditors until proper notice was given. This case did not hold that the acts of the executors were without legal force and effect in relation to any other parties in interest but simply that "a creditor who has not had the notice which the statute expressly directs is not bound in any manner." The *Everett Trust Co. case, supra*, we think has no application.

Morgan v. *Dodge*, 44 N. H. 255, although cited by plaintiff does not support her contention. In that case the widow failed to give notice that she accepted the provisions of the will, which was one of the conditions upon which a bond of the character given by the executrix could be accepted. The New Hampshire court held in effect that the letters of administration were not void but voidable and sufficient until revoked. The fact that in the case at bar two heirs who had been theretofore unknown did not come in until about six months later and enter their consent to the appointment of the administrators without surety did not, as we think, extend the period of limitations on the part of creditors for filing claims. The creditors had been duly notified and made no objection to the bond. Whatever objections anyone else might have made were waived and the order approving the bond and appointing the administrators has never been revoked or modified by the court.

Another and as we think more effective objection to the validity of the tax in controversy is made by the plaintiff.

It appears that on March 2, 1901, all the debts and charges against the estate having been paid, an order and decree

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was entered by the Probate Court establishing the respective interests of the widow and six cousins of the decedent in the personal estate then remaining in the possession of the administrators which amounted to $869,152.95, and $360,000 was distributed. Before the period for filing claims had expired (which date we have found to be June 14, 1902) an attorney entered an appearance in the Probate Court for "Edwin G. Bates, one of the next of kin of John D. Bates", and on June 18, 1902, a petition was filed pursuant to this appearance which showed that Edwin G. Bates was claiming a share in the distribution of the then remaining undistributed portion of the estate in equal degree with the six cousins of the decedent whose interests had already been established. This petition was dismissed by a decree of the Probate Court on September 30, 1902, and an appeal having been taken to the Supreme Judicial Court of the State, a final order was entered therein on November 13, 1902, affirming the action of the Probate Court. Sometime after July 1, 1902, the remainder of the personal estate of the decedent amounting to $509,152.95 was distributed by the administrators, one-half to the widow and one-half to the cousins of the decedent whose interests had theretofore been established by the court. The administrators filed a second legacy return and under it paid to the collector a tax in the sum of $10,907.70 on August 27, 1903, being the tax in controversy. Plaintiff now contends that the estate was in litigation until subsequent to July 1, 1902, the date when the taxing act was repealed, and consequently no beneficial interests vested in possession or enjoyment of the heirs prior to that date and the tax was refundable.

Numerous cases are cited by the respective counsel of the parties but the case before us is a peculiar one and the facts in it differ from those in any of the cases to which our attention is called. Both parties cite *McCoach* v. *Pratt*, 236 U. S. 562, but the decision in that case merely explained the decision in the *Jones case*, 236 U. S. 106, and applied the rule established in that case. In both of these cases, the period for filing claims against the estate did not expire until after July 1, 1902. Counsel for defendant argues that the decisions

in these two cases confined the application of the statute to cases in which a similar state of facts existed, but the portion of the opinion in the *McCoach case*, *supra*, upon which defendant relies was obviously intended to apply merely to the particular facts which existed in that case. The general principle which governs the imposition of the tax was expressed in the *Jones case* as follows:

> The decisive question, therefore, in the present case is whether the beneficial interests of the daughters, upon which the tax was collected, had become absolutely vested in possession or enjoyment prior to July 1, 1902, or were at that time contingent. If they had become so vested, the effort to recover the tax must fail; but, if they were contingent, the tax must be refunded.

Considering now the particular facts shown to exist in the case at bar, it will be noticed that we have held in effect that the time for filing claims expired on June 14, 1902, and it will be further observed that this is the earliest date possible even under defendant's contention. Until the expiration of that period the shares of the heirs could not be definitely determined but, as shown above, before that date arrived an appearance was entered for another alleged heir. The petition pursuant to this appearance, as stated above, was not filed until June 18, 1902, but it showed that one Edwin G. Bates was claiming a share in the distribution of the then remaining undistributed portion of the estate in equal degree with the six cousins of the decedent whose interests had already been established. This petition was subsequently dismissed but the final action upon it by the Supreme Court was not taken until November 13, 1902.

Without considering the appearance which had been filed, it is obvious that the heirs were not entitled to either possession or enjoyment prior to June 14, 1902, because the time for filing claims had not expired. Whether they were entitled to possession or enjoyment prior to July 1, 1902, depends on the effect of the proceedings instituted in behalf of Edwin G. Bates.

The heirs were not in actual possession of their shares prior to the date last mentioned but we do not think this

was necessary in order that they should be in enjoyment thereof. If they had the right to demand from the administrators possession of their interests as established by the court, we think this right constituted an "enjoyment" within the meaning of the statute, but we are unable to find that at any time prior to July 1, 1902, they had the right to demand that their shares be turned over to them. We have already seen that they could not demand payment thereof even if there had been no appearance for other parties prior to June 14, 1902. It has also been noted that before that date arrived an appearance was entered by an attorney which notified the administrators that an additional person claimed to be "next of kin" and entitled to a share in the distribution of the funds in their hands. The administrators had no way of knowing what kinship was claimed until the petition was filed. For aught they could determine before the filing of the petition, Edwin G. Bates might be claiming a close relationship to the intestate. The petition, it is true, was not filed until June 18, 1902, four days after the expiration of the ordinary period of administration, and when the time for filing claims had expired, but it was filed within the requisite time after the appearance was entered for action to be taken thereon by the court, and while it was subsequently dismissed a contingency was created by the entry of appearance for an alleged heir and this contingency existed until final action was taken thereon by the Supreme Court. Would any court while litigation of this nature was pending say that the heirs had the right to demand their respective shares as previously determined and order the administrators to make distribution accordingly? We think not, and if we are correct in this conclusion the heirs could not be said to be in absolute possession and enjoyment of their interests.

It may be contended that notwithstanding the appearance of another who claimed to be an additional heir in the same degree his claim could only reduce the interest of the other heirs one-seventh each and that they still had an absolute right to the enjoyment of the remainder. But the reduction would depend on the degree of relationship claimed and in

any event a reduction of one-seventh, considering the size of the estate, was not an insignificant matter.

Partial distributions are often made, sometimes by the administrators on their own motion and sometimes after a motion has been made by the heirs and the distribution approved by the court. In most jurisdictions it would seem that the heirs have no absolute right to a partial distribution pending the determination of litigation or other matters affecting the amounts to which they are respectively entitled. The matter rather rests in the discretion of the court after application has been made. It will be noted in this connection that the Government does not make any claim based on the right of partial distribution, and until the petition was filed showing the degree of relationship claimed by Edwin G. Bates, the court would be unable to determine what amount could be safely distributed.

In Massachusetts the rule with reference to distributions is much stronger against the defendant than has been stated above. *Cathaway* v. *Bowles*, 136 Mass. 54, 55, was a case in which the final account of the administrator had been approved, and nothing remained to be done except to pay plaintiff, as sole heir, the amount shown to be due, for which plaintiff brought suit. The court said:

> The obligation to a distributee assumed by an administrator is "to pay to such persons as the court may direct any balance remaining in his hands upon the settlement of his accounts." Pub. Sts. c. 130, s. 2, Gen. Sts. c. 94, s. 2. This contemplates that an administrator is entitled to be protected by a decree of distribution, passed by the Probate Court, before he can be called upon to divide the balance remaining in his hands among those claiming it as distributees under the statutes.

It will be observed that under this rule the administrator is not obligated to make payment until his accounts are settled.

The court further said in this case:

> The proper course for a distributee is to apply to the Probate Court for a decree of distribution. Upon the passing of such a decree in his favor, he has a plain

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> remedy against the administrator, who also is fully protected by the decree. *Loring* v. *Steineman* [1 Met. 204].
>
> * * * * *
>
> It can make no difference that, in the case before us, the plaintiff claims to represent the sole heir at law, or that the defendant has paid her one-half of the balance in his hands. The administrator has the right to have the question whether the plaintiff's intestate was the sole heir at law, entitled to the whole balance in his hands, tried in the Probate Court, which court alone is competent to render a judgment which will fully protect all parties.

The administrator may, however, voluntarily make payment at his own risk, or require a distributee to give security to indemnify him against the risk.

We think it is clear that under the Massachusetts statute and the holdings of the courts of that State thereon, the heirs had no right to demand payment of the administrators in the case now before us as they had not obtained any order for distribution from the court nor even applied for one. The rule laid down above is also stated in *Browne* v. *Doolittle*, 151 Mass. 595, 598, and *Flynn* v. *Flynn*, 183 Mass. 365, 367. In both of these cases it is held that the distributee can not maintain an action against the administrator until there has been a decree for distribution.

Several cases are cited on the part of the defendant as holding that the fact that distribution of the full amount of the legacies was withheld because of litigation, would not prevent the application of the tax, but in none of these cases was there any contingency as to the amount of the interest of the beneficiary, or his right to demand and receive it before July 1, 1902. In *Simpson* v. *United States*, 252 U. S. 547, the court found that the condition of the estate was such that the legatees had a statutory right to institute suit to compel payment of their legacies in full prior to July 1, 1902, and that the suit which had been commenced by some other parties could not in any way have affected such payement. In the case of *Cochran* v. *United States*, 254 U. S. 387, it appeared that there were some claims, the amount of which had not been ascertained, but the time for

filing additional claims had expired, and the size of the estate was so great and the possible amount of these claims so small in comparison that the court held that distribution was properly made, and having been made before July 1, 1902, could be taxed. The main contention in the case was that the tax was invalid because there was no assessment thereof until after July 1, 1902, when the law establishing the taxes was repealed. This point was overruled by the court.

The case of *Kahn* v. *United States*, 257 U. S. 244, cited on behalf of defendant, is also distinguishable. In that case, the court found that the amounts of the legacies were ascertainable and that all claims had been settled or barred except some taxes relatively very small in amount compared to the size of the estate and that a sufficient sum would have remained for their payment after the beneficiaries had received their shares. Upon these facts, the court held that the heirs were entitled to distribution in full.

The case of *Woerishoffer* v. *United States*, 269 U. S. 102, is similar to the *Kahn case.*

In all of the cases cited on behalf of defendant on the point now being considered it appeared that there was no contingency as to the amount to which the legatees were respectively entitled, their shares having been fixed and determined and the funds of the estate were sufficiently large to pay any small claims that existed and leave a remainder sufficient to pay the legatees or distributees in full. It was therefore held that the heirs had an immediate right to receive their shares. Consequently they were absolutely vested and subject to the tax, but the situation was altogether different from that which existed in the case at bar.

The case of *United States* v. *Marion Trust Co.*, 143 Fed. 301, is somewhat similar in its facts to the case at bar and is cited on behalf of plaintiff. Osgood, the intestate in that case, died nearly two years before the taxing act was repealed. "But owing to a dispute between certain persons who claimed to be his heirs, and to the pendency of certain unsettled claims against the estate, the estate remained in process of administration, and was not distributed until after

the repealing act." In ruling upon the case the court said: "Until the estate is ready to pass, without diminution, to the heir, no assessment can take place." The holding was in effect that when the amount which passed to the heirs could not definitely be determined, the tax could not be imposed.

Our conclusion is that the shares of the lawful heirs had not become absolutely vested prior to July 1, 1902, and that the tax in controversy was illegally assessed. Judgment will be awarded plaintiff for $10,907.70.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

DOLLAR STEAMSHIP LINES, A CORPORATION, v. THE UNITED STATES

[No. 42681. Decided January 11, 1937]

On the Proofs

Ocean transportation of mails; extension of contract; extra service.—Where a Government contract for ocean transportation of mails on not to exceed 26 voyages during the year ending June 30, 1928, was on June 19, 1928, extended under the provisions of section 414 of the Merchant Marine Act of 1928 for an indefinite period not exceeding one year, the extension period began July 1, 1928, and compensation for transportation of the mails on an additional, or 27th voyage, in June 1928, was controlled by, and payable under, either the original contract or the extension thereof.

The Reporter's statement of the case:

Mr. Ira L. Ewers for the plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

The plaintiff entered into a contract with the defendant dated July 6, 1927, to carry mails for not exceeding twenty-six voyages during the period beginning July 1, 1927, and

ending June 30, 1928. During this period plaintiff made twenty-seven voyages on the prescribed route, the last one commencing June 29, 1928. From July 1, 1928, to October 1, 1928, plaintiff made six voyages under an order of the Postmaster General dated June 19, 1928, by which the original contract was "extended to the effective dates of new contracts * * * but for a period of not more than one year from June 30, 1928" pursuant to section 414 of the Merchant Marine Act of 1928. The contract of July 6, 1927, and the extension agreement of June 19, 1928, are attached to the petition as Exhibits A and B respectively, and are by reference made a part hereof. Compensation under the original contract was paid for all voyages except the twenty-seventh which commenced on June 29, 1928. For this voyage the plaintiff was paid on a "poundage basis" in the sum of $3,065.69 instead of upon the mileage basis as provided by the contract under which plaintiff would have received $16,934.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This suit is begun to recover $13,868.31, the balance alleged to be due for carrying the mails. The material facts in the case are few and simple. The plaintiff entered into a contract to carry the mails for not exceeding twenty-six voyages during the period July 1, 1927, to June 30, 1928, inclusive, and on June 19, 1928, the original contract was extended "for a period of not more than one year from June 30, 1928." During the period provided for under the original contract, plaintiff made twenty-seven voyages, the twenty-seventh commencing on June 29, 1928. Plaintiff made other voyages under the extension agreement, but the only controversy is over the twenty-seventh voyage for which plaintiff was paid on a poundage basis instead of on a mileage basis as provided by the original contract under which it would have received $13,868.31 more. The case turns upon the question of whether the twenty-seventh voyage was made under the terms of the original contract as extended by the order of June 19, 1928.

Opinion of the Court

Section 414 of the Merchant Marine Act of 1928 provided, among other things, with reference to contracts for the carrying of mails, that—

> Any such contract which expires on June 30, 1928, may be extended for a period of not more than one year from such date.

The order of the Postmaster General extending the contract followed the wording of the statute and extended it "for a period of not more than one year from June 30, 1928."

As above stated, the original contract called for "not exceeding twenty-six voyages" during "the period July 1, 1927, to June 30, 1928, inclusive." The plaintiff contends that when the original contract was extended on June 19, 1928, the order of extension became operative immediately and authorized the sailing in question. Defendant contends that the original contract providing for only twenty-six voyages did not terminate until June 30, 1928, and that the extension became operative only from the termination date of the original contract. If this contention is sustained, it follows that the twenty-seventh voyage which was made within the period of the original contract was not covered by the provisions of either the original contract or its extension.

We think the provision of the Merchant Marine Act above set out is capable of only one construction. It applied to contracts which expired on June 30, 1928, and provided in the same sentence that specifies the date that they might "be extended for a period of not more than one year from such date." We think it too clear for argument or discussion that the words "such date" can apply only to June 30, 1928, and that the extension agreement therefore applied to a period which began July 1, 1928, and not on June 19th as the plaintiff contends. It will be observed also that the order of extension was made "for a period of not more than one year from June 30, 1928" instead of the year beginning June 19, 1928.

Plaintiff cites several cases in support of its contention, but they involve such different circumstances that we think they have no application. Neither the original contract nor

Syllabus

the extension having provided for the twenty-seventh voyage, the plaintiff is not entitled to receive pay therefor according to the mileage rates provided in the original contract.

Plaintiff's petition must be dismissed and it is so ordered.

Whaley, *Judge;* Williams, *Judge;* Littleton, *Judge;* and Booth, *Chief Justice*, concur.

EDNA L. McNAGHTEN v. THE UNITED STATES

GLADYS JANSS POLLOCK v. THE UNITED STATES

[Nos. 42688 and 42689. Decided January 11, 1937]

On the Proofs

Income tax; liquidating distributions by corporations; distributions by trust to beneficiaries.—Liquidating distributions by a corporation to trustees representing capital net gain in their hands for income tax purposes under the provisions of the Revenue Act of 1926 are subject to the same provisions in the hands of beneficiaries of the trust when distributed to them although distributable only as dividends on the trust corpus under the terms of the trust and the State law controlling its administration.

Distribution of trust income to beneficiaries.—Where a trust, during the taxable year, received taxable income in excess of the amounts distributed by it to beneficiaries of the trust, the beneficiaries can not escape taxation on distributions to them by showing that at the time of such distributions the trust had no income.

Taxation of trust beneficiaries on liquidation distributions of corporation to the trust.—The beneficiaries of a trust which held the stock of a corporation then in course of complete liquidation were improperly taxed on liquidation distributions by the corporation to the trust in redemption of the corporation stock where the basis of the stock had not yet been recovered by the trust.

Sufficiency of claims for refund as basis of suit.—The plaintiffs' claims for refund of taxes held sufficient to support their suits for refund.

Reporter's Statement of the Case

Commissioner's failure to assess; statute of limitations; estoppel.—Where the Commissioner of Internal Revenue, with all the facts before him necessary to the determination and assessment of taxes assessable against a trust, neglected and failed to make such assessment within the statutory limitation therefor, without such failure being contributed to by the taxpayer, there is no basis for estoppel of the taxpayer to claim refund of overpayment of taxes otherwise due and refundable by the Government.

The Reporter's statement of the case:

Mr. Thomas R. Dempsey for the plaintiffs. *Mr. A. Calder Mackay* was on the briefs.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

For the year 1927 plaintiffs, who were beneficiaries of a trust created by the will of Arthur Letts who died in 1923, filed income tax returns in which they included as corporate dividends certain distributions made to them by the trustees of the Letts trust. Upon this income plaintiff McNaghten paid an income tax of $58,531.19 and plaintiff Pollock paid a tax of $56,232.17. Thereafter the Commissioner of Internal Revenue in his final determination, on the basis that there had been a capital gain to the trust, taxed plaintiffs on their distributions at capital gain rates and refunded to McNaghten $526.75 and to Pollock $2,303.13. Plaintiffs here seek to recover the balance of the tax paid in the amounts of $58,004.44 and $53,929.04, respectively. Recovery is claimed on the ground that plaintiffs, as beneficiaries under a testamentary trust, were not subject to tax upon the whole or any part of the net income of said trust.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiffs are citizens and residents of California. March 15, 1928, they filed their respective income tax returns for 1927 showing income taxes of $58,531.19 and $56,232.17, respectively. These amounts were paid in four equal

installments of $14,632.80 and $14,058.05, respectively, on March 15, June 15, September 15, and December 15, 1928.

Each of plaintiffs included in her return an item of $353,791.74 as taxable dividends received as a beneficiary of a trust under the will of Arthur Letts, deceased.

2. Thereafter, upon audit and review of plaintiffs' returns for 1927, the Commissioner of Internal Revenue on April 25, 1930, issued and mailed his thirty-day letter in which he proposed a deficiency in tax for 1927 against each plaintiff in the amount of $162,794.11. Thereafter, on May 6, 1930, plaintiffs filed written protests to the proposed deficiencies, respectively, and a conference was held in connection therewith on May 31, 1930, between plaintiffs' representative and the Commissioner, as a result of which the proposed deficiencies were never assessed or collected and were abandoned.

3. February 6, 1931 each plaintiff filed a claim for refund for 1927 in which they asked for the refund of $58,531.19 and $56,232.17, respectively. Each claim, after reciting the facts above set forth, stated as follows:

> Claimant is informed that the Bureau of Internal Revenue is considering taking the position that all of the distributions made by Holmby Corporation to its shareholders subsequent to January 1, 1924, were in the nature of liquidating dividends and represented a return of capital to the extent of the basis of said stock in lieu of taxable dividends.
>
> Claimant does not acquiesce in this proposed determination of the Bureau and is filing this claim as a protection of her rights against the running of the statute of limitations, but in the event that it is finally decided by the Commissioner of Internal Revenue, the United States Board of Tax Appeals, or any court of competent jurisdiction that all of said distributions represented return of capital to the extent of cost or other basis of said shares and that no part thereof represented taxable dividends, then claimant respectfully requests that her net income for said year be reduced by the amounts re-

ported as taxable dividends received from said trust ($355,528.42) and that her capital net gain be increased by the amount of her beneficial share of the amount received by said trustees in excess of their cost or basis of said shares ($75,051.89) and respectfully requests that her net tax liability be adjusted accordingly and refund be made to her of the amount of tax overpaid for said year.

Thereafter, on March 14, 1931 each plaintiff filed an amendment to her claim for refund, amending and supplementing the claim filed on February 6, 1931, as follows:

> Claimant is informed that the Bureau of Internal Revenue is considering taking the position that the net income of the trust which was created under the last will of Arthur Letts (deceased) of which Arthur Letts, Jr., Malcomb McNaghten, Harold Janss, Harry R. Philp, and John G. Bullock are trustees, is taxable to the trustees, and not taxable to the beneficiaries, and that the trustees should have filed form 1040 and paid the tax due thereon.
>
> Claimant does not acquiesce in this proposed determination of the Bureau of Internal Revenue, but in the event that it is finally decided by the Commissioner of Internal Revenue, the United States Board of Tax Appeals, or any court of competent jurisdiction that said sum ($353,791.74) did not constitute taxable income to claimant on account of the net income of said trust being taxable income of the trustees, or that the total distributions of Holmby Corporation were in the nature of liquidating dividends and therefore a return of capital, as explained in claimant's claim for refund filed on or about February 6, 1931, for said year, then claimant respectfully requests that her net taxable income be reduced by said sum of $353,791.74 and that her tax liability be adjusted accordingly and refund be made to her of the amount of tax so overpaid.

4. Thereafter, upon final determination of plaintiffs' tax for 1927, the Commissioner of Internal Revenue eliminated the item of $353,791.74 as taxable dividends, and in lieu

thereof found a capital (net) gain for each of the plaintiffs for 1927 of $429,940.68 which represented a portion of the gain derived by the Trustees from the liquidation of the Holmby Corporation upon which he computed the tax at 12½%. In this determination the Commissioner explained his computation as follows:

> The profit of $429,940.68 is the difference between $2,099,701.51, the liquidating dividends received in 1927, and $1,669,760.83 representing the remainder of the cost of this stock as reduced by liquidating dividends received from the Holmby Corporation in prior years.
>
> Dividends of $353,791.74 from the Holmby Corporation reported on your original return have been eliminated for the reason that this office holds that the distribution made by the corporation was a liquidating distribution.

Thereupon the Commissioner issued certificates of overassessment in which he found overassments in favor of plaintiffs of $526.75 and $2,303.13, respectively, which were refunded—the claims for refund being allowed in the aforesaid amounts respectively and the balance thereof rejected on a schedule signed July 9, 1932.

5. Plaintiffs' father, Arthur Letts, Sr., died testate May 18, 1923, leaving a last will and testament which was duly probated in the Superior Court of the State of California in and for the County of Los Angeles. By the terms of this will it was provided that certain properties described therein be distributed to Arthur Letts, Jr., Malcolm McNaghten, Harold Janss, J. G. Bullock, and Harry G. R. Philp as trustees of the trust therein created, each of whom duly qualified and acted in such capacity until May 18, 1933. The will provided that the trustees should hold such property in trust for a period of ten years from the date of the death of the testator, the income of the trust estate during that time to be paid in certain proportions to the beneficiaries of the trust. Each of these plaintiffs' interest as a beneficiary under the terms of the trust was 30% of all income payments and a like percentage of the corpus upon distribution. The trustees were empowered to hold, con-

trol, sell, convey, mortgage, loan, lease, invest, and re-invest and otherwise manage the trust property as to them might seem best, to the end that the trust estate should produce the maximum income therefrom, and to collect and receive all income from the trust property; and from the gross income derived from the trust property to pay and discharge all taxes, costs, charges, and expenses incurred in the administration of the trust, and to pay and distribute the net income from the trust to the beneficiaries therein named semi-annually or more frequently if in the judgment of the trustees same could be done without inconvenience to the reasonable management of the trust estate. A copy of said will is in evidence as Exhibit H-1, and is made a part hereof by reference.

6. August 20, 1925, the estate of Arthur Letts, deceased, was distributed and the trustees then received, among other properties, 69,168 shares of Holmby Corporation stock as a part of the aforesaid trust. This stock had a fair market value of $7,215,605.76, or $104.32 a share, on May 18, 1923, the date of the death of Arthur Letts.

About 1921 Arthur Letts organized the Holmby Corporation under the laws of California for the particular purpose of having the corporation acquire, manage, and operate sundry properties then owned by him. By April 1923 he had transferred substantially all of his properties to this corporation. In addition to decedent, Arthur Letts, Jr., Malcolm McNaghten, Harold Janss, and J. G. Bullock were the directors of the Holmby Corporation, and are the same persons designated in the will of decedent as trustees of the trust therein created. At the time of the death of Arthur Letts, Sr., the Holmby Corporation had outstanding 138,440 shares of common capital stock, all of which, except 104 shares, was owned by said Arthur Letts. The 104 shares were owned as follows:

Arthur Letts, Jr.	101 shares
Malcolm McNaghten	1 share
Harold Janss	1 share
J. G. Bullock	1 share

After Mr. Letts' death one share of stock was transferred to Harry G. R. Philp, the remaining named trustee, who

thereupon became a director of the Holmby Corporation. At the time of the distribution of his estate on August 20, 1925, under an order and decree of the Superior Court within and for the County of Los Angeles, State of California, Florence M. Letts Quinn, the widow of Arthur Letts, had distributed to her, among other properties, one-half of 138,336 shares of Holmby Corporation stock owned by decedent at the time of his death, or 69,168 shares. Shortly after the death of Arthur Letts, his heirs agreed among themselves that Holmby Corporation should be liquidated and its assets distributed to its stockholders as soon as the same could be done without sacrifice. On account of the expressed desire of the heirs, the Board of Directors of Holmby Corporation decided to liquidate its assets and distribute the proceeds thereof, as a result of which Holmby Corporation has been in process of complete liquidation ever since a date in 1923 shortly after the death of Arthur Letts.

7. Between May 18, 1923, and December 31, 1926, the Holmby Corporation distributed to the trustees $1,649,656.80, all of which was distributed from earnings and profits of this corporation. Of the above-mentioned amount of $1,649,656.80 distributed by the Holmby Corporation to the trustees prior to December 31, 1926, there was distributed to each of the plaintiffs herein $15,522.99 during 1925 and $124,502.40 during 1926. The trustees filed their report with the Superior Court of California showing the foregoing distributions and that court entered its order approving the report as rendered. The foregoing amounts received by plaintiffs were returned by each of them in their respective income-tax returns for 1925 and 1926. Plaintiff McNaghten paid an income tax of $4,385.83 for 1925 and $37,819.02 for 1926, or a total tax for the two years of $42,204.85; of the tax paid for 1925 the amount of $1,930.85 thereof was attributable to the foregoing amounts distributed to her by the trustees, and of the tax paid for 1926 the amount of $21,626.08 was attributable to the foregoing amounts distributed to her by the trustees. No part of the taxes paid by this plaintiff for 1925 and 1926 has been refunded to her

and any recovery thereof is barred by the statute of limitation.

Plaintiff Pollock paid a tax of $4,805.24 for 1925 and $37,833 for 1926, or a total of $42,638.24 for the two years; of the tax paid for 1925 the amount of $2,012.31 was attributable to the above-mentioned amounts distributed to her by the trustees, and of the tax paid for 1926 the amount of $21,556.89 was attributable to the foregoing amounts distributed to her by the trustees. The amount of $9,458.25 of the taxes paid by this plaintiff for 1925 and 1926, in the amounts received by her on account of the distributions mentioned, has been refunded to her and recovery of the remainder of the taxes paid for 1925 and 1926 on such distributions is barred by the statute of limitation.

The trustees under the will of Arthur Letts filed a fiduciary return, Form 1041, for each of the years 1925 and 1926. No federal income tax returns were filed by such trustees on Form 1040 for either 1925 or 1926 and no income tax was paid by the trustees for such years on any income of the trust.

During 1927 the Holmby Corporation made further distributions to the trustees out of its earnings and profits amounting to $1,185,088.24, on the dates and in the amounts as follows:

February 8, 1927	$899,184.00
March 19, 1927	64,326.24
June 8, 1927	74,941.50
September 2, 1927	74,941.50
December 1, 1927	71,695.00

Immediately after the receipt of each of the aforesaid distributions from earnings and profits of The Holmby Corporation, the trustees distributed the sum so received to the beneficiaries of the trust and each of the plaintiffs received $353,791.74 thereof. This is the same item referred to above as having been included as "Dividends" on plaintiffs' respective income tax returns for 1927.

8. May 17, 1927, the Holmby Corporation made a distribution of $1,920,700 in cash and bonds, and on October 11, 1927, it made a distribution of property of the value of $3,893,100 to the trustees who surrendered certificates rep-

Reporter's Statement of the Case

resenting 19,207 shares and 38,931 shares of capital stock of the Holmby Corporation, respectively, on these dates. The Holmby Corporation charged these distributions to its capital stock account. No part of either of the amounts was distributed by the trustees to plaintiffs or either of them, the trustees having retained the full amount thereof as part of the corpus of the trust estate.

9. October 4, 1928, the trustees filed their first account current and report with the Superior Court of California, showing fully all their acts in the administration of the trust. So far as it related to 1927 it disclosed the following:

PRINCIPAL TRANSACTIONS

1927				
May 17,	Holmby Corporation Capital Distribution, 19,207 shares canceled. Appraised @ $97.46 per sh	1, 871, 914. 22		
	Taken up @ $100.00 per sh		1, 920, 700. 00	48, 785. 78
Oct. 11,	Holmby Corporation Capital Distribution, 38,931 shares canceled. Appraised @ $97.46 per sh	3, 794, 215. 26		
	Taken up @ $100.00 per sh		3, 893, 100. 00	98, 884. 74

This report also disclosed as "income receipts" for 1927 numerous items in the total amount of $1,222,011.64 consisting of interest on deposits, United States Treasury certificates and bonds, and dividends received from the Holmby Corporation. The report disclosed "income disbursements" during 1927 in the total amount of $1,214,375.81 consisting of numerous items of expense paid by the trustees in the management of the trust and the amounts distributed during this year to the beneficiaries of the trust. The distributions therein shown to have been made to the plaintiffs amounted to $353,791.74 each.

Thereafter on November 5, 1928, the Superior Court of California entered its order approving this report as ren-

dered. A duly certified copy of this order is in evidence as Exhibit J and is made a part hereof by reference.

10. The trustees, under the will of Arthur Letts, deceased, filed a fiduciary return, Form 1041, for 1927, on which the following items of income and deductions were shown:

Income:		
Interest on Bank Deposits, etc. (Item 2)		$196.75
Profit from Sale of Real Estate, etc. (Item 5)		—3,302.29
Dividends on Stock of Domestic Corporations (Item 6)		1,185,094.74
Total Income		1,181,989.20
Deductions:		
Taxes Paid (Item 10)	$184.33	
Other Deductions Allowed by Law (Item 14)	2,499.08	
Total Deductions		2,683.41
Net Income (Item 16)		1,179,305.79

No federal income tax returns were filed by the trustees on Form 1040 for 1927, and no income tax was paid by them for that year on any income of the trust.

11. All the facts hereinbefore set forth in these findings, except those relating to matters occurring since 1930, were before the Commissioner of Internal Revenue and the defendant and were fully known to the Commissioner on or before July 1, 1930.

The court decided that plaintiffs were entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiffs contend that the amounts distributed by the Holmby Corporation out of its earnings and profits, being distributions in complete liquidation of that corporation, all constituted a return of capital to the trustees of the Arthur Letts Trust for the reason that, under section 201 (c) of the Revenue Act of 1926, they were in the nature of part payments in exchange for the stock upon which distributed and applied against and reduced the basis thereof in the trustees' hands, a basis which had not been wholly recovered by the end of 1927. Plaintiffs further

contend that since all of such amounts were returns of capital to the trustees they did not represent income to plaintiffs under section 219 (b) (2) of the act and hence were not properly included in the net taxable income of plaintiffs as beneficiaries, even though actually distributed to them by the trustees.

Plaintiffs concede in the position they take that the trustees of the Arthur Letts Trust derived gains from two redemptions of stocks of the Holmby Corporation which took place during 1927, but they contend that such gains were taxable to the trustees alone since, as they insist, no part thereof was distributed to them as beneficiaries under the terms of the trust.

The facts as set forth in the findings disclose the manner in which the Commissioner of Internal Revenue finally disposed of the tax liability of plaintiffs for 1927 and the basis on which he rested his decision. Briefly stated, the Commissioner upon final determination of plaintiffs' tax liability for 1927 eliminated the amount of $353,791.74 included by them in their returns for that year as ordinary income received by them from the trustees subject to normal and surtax rates, and in lieu thereof found a capital net gain for each of the plaintiffs for 1927 in the amount of $429,940.68 which he taxed at capital-gain rates of 12½ percent and refunded to plaintiffs the amounts of $526.75 and $2,303.13, respectively. In doing this, however, the Commissioner of Internal Revenue did not properly interpret the decree of November 5, 1928, of the Superior Court of the State of California approving the distributions by the trustees to the beneficiaries, and likewise approving retention by the trustees as corpus of the amounts received by them in redemption of the stock. *Freuler* v. *Helvering*, 291 U. S. 35. In other words, the effect of the decree of the California court which had jurisdiction to determine the property rights of the parties under the trust was that the amounts distributed by the trustees to and received by the beneficiaries, plaintiffs herein, were distributable to the beneficiaries and that the amounts received and retained by the trustees in redemption of the stock constituted corpus in their hands and were not distributable to the beneficiaries.

In this situation the Commissioner erred in taxing to plaintiffs any amount in excess of $353,791.74 held by the California court to be distributable to each of them. The Commissioner taxed each plaintiff with the amount of $429,940.68 for 1927, or $76,148.94 in excess of that properly taxable. Plaintiffs therefore have each overpaid the tax due for 1927 in the amount of $9,518.62, which the defendant concedes to be due. Counsel for defendant insists however that plaintiffs cannot recover this overpayment for the reason that the grounds stated in their claims for refund are not sufficient to support this suit. We think, however, that there is no merit in this contention of the defendant.

The issues and contentions here made by plaintiffs with reference to the taxability to them of the distribution of $353,791.74 each in 1927 were considered and denied by the United States Board of Tax Appeals and the U. S. Circuit Court of Appeals for the Ninth Circuit in *Arthur Letts, Jr. v. Commissioner of Internal Revenue*, 30 B. T. A. 800, and in 84 Fed. (2d) 760, in which it was held that liquidating distributions to a trustee, and representing in his hands capital net gain under sections 208 (a) and (b) and 219 (a) of the Revenue Act of 1926, are subject to the same provisions in the hands of the beneficiary when distributed to him, although distributable only as dividends on the trust corpus under the terms of the trust and the law of the state controlling its administration under section 208 (e) of the same act. We agree with those decisions and no useful purpose would be here served by a detailed discussion thereof. It is sufficient to state that Arthur Letts, Jr., was a beneficiary of the trust here involved and in 1927 received a distribution from the trustees in the same amount as each of these plaintiffs. In seeking a reversal of the decision of the Board of Tax Appeals Letts contended before the Circuit Court of Appeals, 84 Fed. (2d) 760, 762, that the $1,185,088.24 which the trust distributed to its beneficiaries in 1927 was distributed to them before the trust had recovered the cost of its Holmby Corporation stock or had derived any taxable gain therefrom; that, therefore, at the time it was distributed, the $1,185,088.24 was not income to the trust; and that, not

being income to the trust, it was not taxable to the beneficiaries, though actually distributed to and received by them as income. With respect to this contention the court said "There is no merit in this contention. The time unit we are dealing with is the taxable year; in this case, the calendar year 1927. In that year the trust received taxable income to the amount of $1,432,939.28 and distributed to its beneficiaries, as income, $1,185,088.24. Whether it distributed the $1,185,088.24 before or after it received the $1,432,939.28 is immaterial. A beneficiary to whom income has been distributed by a trust cannot escape taxation thereon by showing that, at the time of such distribution, the trust itself had no income. *Baltzell* v. *Mitchell* (C. C. A. 1), 3 F. (2d) 428, 431; *Abell* v. *Tait* (C. C. A. 4), 30 F. (2d) 54, 56."

Neither of the plaintiffs herein is entitled to recover any amount in excess of $9,518.62. In oral argument counsel for defendant contended that judgments for these conceded overpayments should not be entered for the reason that the trustees of the Arthur Letts Trust did not pay any tax for 1927 upon the gain derived by them through the liquidating distributions made to the trust by the Holmby Corporation, which distributions were not distributable to the beneficiaries under the terms of the trust and the decree of the California Court, citing *White* v. *Stone et al.*, 78 Fed. (2d) 136. However, under the facts and circumstances of this case, we find no justification for the application of the equitable principle for which defendant's counsel contends. In the case of *White* v. *Stone et al.*, *supra*, the Commissioner determined and assessed the tax there involved in accordance with the decision of the Circuit Court of Appeals for the circuit in which the taxpayer resided, which decision was later reversed, while in the case at bar the Commissioner was bound by no interpretation of the law, except his own, with respect to the question before him. Moreover, all the facts necessary to a determination and assessment of taxes against the trustees and the beneficiaries of the Arthur Letts Trust were before him and fully known by him on and prior to July 1, 1930, about eight and one-half months before any statute of limitation would run against the legal assessment of any tax

for 1927 against the trustees. He simply neglected properly to assess the tax and permitted the limitation statute to run. There were no representations of any kind by plaintiffs that mislead, or could have mislead, the Commissioner, and there is no basis for estoppel. In addition to this the amounts received by these plaintiffs in 1925 and 1926 were not taxable for the reason that they were liquidation distributions by the Holmby Corporation to the trust in respect of that corporation's stock, the basis of which stock had not then been recovered by the trust. Plaintiff McNaghten therefore overpaid $23,556.93 for 1925 and 1926 and plaintiff Pollock overpaid $13,110.95 for the same years. Any recovery of these overpayments is now barred.

Judgment will be entered in favor of each of the plaintiffs for $9,518.62 with interest as provided by law. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

WILEY H. O'MOHUNDRO v. THE UNITED STATES

[No. 42794. Decided January 11, 1937]

On the Proofs

Rental allowances; Army officer.—The plaintiff, a captain in the United States Army assigned to temporary duty with the Civilian Conservation Corps, and who, with other officers, occupied a tent as quarters from June 15th to November 11th, 1935, held entitled to rental allowances of an officer of his rank and pay during that period of time.

The Reporter's statement of the case:

Mr. John W. Gaskins for the plaintiff. *Mr. George A. King* and *King & King* were on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

Plaintiff is a captain in the United States Army, without dependents, and was serving with his regiment at Fort Ontario, New York, on May 14, 1933. At that time he was assigned to and occupied quarters No. 83-A at that post, consisting of living room, kitchen, bathroom, and two bedrooms. He was, on that date, ordered to proceed to Fort Slocum, New York, for temporary duty in connection with Civilian Conservation Corps activities. He occupied one room in a Government building at Fort Slocum until May 30, 1933, when he was ordered to and did proceed to C. C. C. Camp No. 9, near Bolton Landing, New York, as commanding officer. At Camp No. 9 he occupied, with two other officers, without charge, a Government tent, which was the only quarters available to him. Camp No. 9 was two or three hundred miles from Fort Ontario, and consisted entirely of tentage. He remained on duty at this camp until the end of November 10, 1933.

A communication dated June 1, 1933, was received by plaintiff in due course from the commanding officer at Fort Ontario reading as follows:

"On account of shortage of quarters it has been necessary to use the quarters assigned to you. Your furniture and household goods have been placed in the lounge room of the Officers' Club where it is securely locked up. The dishes and articles except furniture have been packed in barrels and boxes for safe keeping. Upon your return to the Post it is probable you will be assigned quarters in the Bachelor Building, where quarters would now be made available for you if necessary. Whether you will be assigned your old quarters will depend on the situation at the time of your return."

Quarters No. 83-A at the Fort Ontario Post were occupied by various officers on temporary duty there beginning June 1, 1933, without written assignment.

On August 20, 1933, they were formally assigned to Captain Eduardo Andino, and this assignment continued during the period here involved.

On October 1, 1933, plaintiff's assignment to these quarters was formally terminated.

Opinion of the Court

On April 23, 1934, plaintiff submitted a claim to defendant for rental allowance for the period beginning June 15, 1933, and ending at the close of November 10, 1933. This claim has not been allowed and this suit is brought thereon.

If plaintiff is entitled to rental allowance for the period June 15, 1933, to November 10, 1933, both dates included, the amount thereof would be $248.20.

The court decided that plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff, who is an officer in the regular army, brings this suit to recover rental allowances on the ground that he was not furnished adequate government quarters while serving on temporary duty with the Civilian Conservation Corps from June 15, 1933, to November 11, 1933.

During the period of the claim the plaintiff, in company with two other officers, occupied a canvas tent. The act of March 4, 1915, authorized the Secretary of War to determine where and when there are no public quarters available within the meaning of the law, and pursuant to the authority vested in him by this act the Secretary of War has determined that tents furnished the commissioned personnel of the Army at Conservation Corps Camps do not constitute adequate quarters. This court in *Byerly* v. *United States*, 58 C. Cls. 269, and *Ackerson* v. *United States*, 60 C. Cls. 918, held that the action of the Secretary of War in this matter was final and conclusive.

The defendant, however, contends that the plaintiff is not entitled to recover because he did not expend any money for the rental of private quarters for his personal use. In support of this contention counsel for defendant cite *Irwin* v. *United States*, 38 C. Cls. 87; *Odell* v. *United States*, 38 C. Cls. 194; *Ackerson* v. *United States*, *supra;* and *Carter* v. *United States*, 79 C. Cls. 166. Plaintiff, on the contrary, urges that all except the last of these cases involved claims arising before section 6 of the act of June 10, 1922, was amended by section 2 of the act of May 31, 1924, and hence are inapplicable; and that the decision in the *Carter case*,

supra, was based upon other grounds. The question so raised makes it necessary to consider the effect of the amendment of 1924 to which reference is made above.

Section 2 of the act of May 31, 1924, amending the act of June 10, 1922, so far as material to this case, reads as follows:

> SEC. 2. That section 6 of said Act be, and the same is hereby, amended to read as follows:
>
> "SEC. 6. Except as otherwise provided in the fourth paragraph of this section, each commissioned officer below the grade of brigadier general or its equivalent, in any of the services mentioned in the title of this Act, while either on active duty or entitled to active duty pay shall be entitled at all times to a money allowance for rental of quarters. * * *
>
> * * * * *
>
> [Fourth paragraph] "No rental allowance shall accrue to an officer, having no dependents, while he is on field or sea duty, nor while an officer with or without dependents is assigned as quarters at his permanent station the number of rooms provided by law for an officer of his rank or a less number of rooms in any particular case wherein, in the judgment of competent superior authority of the service concerned, a less number of rooms would be adequate for the occupancy of the officer and his dependents."

We need not analyze the provisions of the fourth paragraph as it is evident from a casual reading that the plaintiff's case is not included in the exceptions stated therein. The only remaining question in the case is whether the provisions of the first paragraph of section 6, as quoted above, are absolute and unqualified. The language would so indicate, but in addition we have the report of the Committee on Military Affairs (House Report No. 236, 68th Cong., 1st Sess., pp. 2, 3) as follows:

> The second section of the bill is a redraft of section 6 of the pay readjustment act relating to money allowance for rental of quarters in order to make clear the import and uniform the application of the same. The textual arrangement and scheme of the section as a whole has been much improved by including and combining all the exclusionary provisions affecting rental allowance

in a single paragraph. This paragraph is preceded by three paragraphs containing the express grant of rental allowance, certain and unconditional in nature except as conditioned by aforesaid exclusionary provisions of the fourth paragraph, as conclusively appears from the initial clause of the redrafted section, reading: "Except as otherwise provided in the fourth paragraph of this section." The effect of this is to simplify the meaning and administration of this section by securing to all officers drawing pay-period pay the corresponding rental allowance which the section creates and which ceases to accrue only in the circumstances specified in the fourth paragraph thereof.

That the language of the existing section, as reflecting the legislative intent in this matter, has proved unsatisfactory and should not longer be allowed to stand is the conclusion of your committee from a consideration of various decisions of the Comptroller General thereon. (2 Comp. Gen. 47, July 25, 1922; 2 Comp. Gen. 107, August 11, 1922; 2 Comp Gen. 160, August 30, 1922; 2 Comp. Gen. 399, December 26, 1922; 2 Comp. Gen. 430, January 10, 1923; 2 Comp. Gen. 437, January 16, 1923; 2 Comp. Gen. 745, May 10, 1923; reconsideration decision May 22, 1923, to Secretary of War; Royce case, June 30, 1923, Mem. Bur. S. & A., pp. 7576–7578.)

It is quite plain from a reading of this report that the committee presented the amendment to Congress on the ground that the construction placed by the Comptroller General on the statute as it originally stood was unsatisfactory and that the intent was to provide for an "express grant of rental allowance, certain and unconditional in nature", except as conditioned by exclusionary provisions of the fourth paragraph, which would secure "to all officers drawing pay-period pay the corresponding rental allowance which the section creates" and which would cease to accrue "only in the circumstances specified in the fourth paragraph."

In the *Carter case*, *supra*, it appeared that the officer was supplied quarters at his permanent station which he occupied for some time without protest and that the Army Regulations specifically provided that "any quarters at his permanent station voluntarily accepted and occupied by an officer who has no dependents * * * will be conclusively presumed to

Syllabus

be adequate." This regulation is not applicable to the instant case in which the plaintiff was given only a temporary station but was sufficient to defeat the claim made in that case.

The plaintiff in the case at bar having been assigned to a temporary station came definitely under the general provisions, and none of the exceptions having any application to the case the plaintiff is entitled to recover the amount to which he is entitled as shown by the findings. Judgment will be awarded for $248.20 accordingly.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

HENRY STANLEY WOOD v. THE UNITED STATES

[No. 42818. Decided January 11, 1937]

On the Proofs

Income tax; execution of waiver by attorney; validity of waiver.—A power of attorney from a taxpayer authorizing an attorney to represent and act for him before the Bureau of Internal Revenue and Treasury Department in all matters in which the taxpayer was concerned, and particularly in the matter of his income tax returns and assessment of taxes thereon, was sufficient authority for the execution of income tax waivers by the attorney on behalf of the taxpayer.

Validity of waiver; acceptance by Commissioner of Internal Revenue.—Acceptance by the Commissioner of Internal Revenue of a waiver filed by the taxpayer under the provisions of section 284 (g) of the Revenue Act of 1926 was not essential to the validity of the waiver or to give it effect under the statute.

Rejection of claim for refund on erroneous assumption of fact, and not on merits.—Where a claim for refund for the year 1919 dependent upon the determination of the 1917 and 1918 taxes then on appeal before the Board of Tax Appeals was rejected under the erroneous assumption that the 1919 taxes were also before the Board for determination, such purported disallowance of the claim was ineffective and did not constitute a rejection of the claim within the meaning of the statutes, from which the statute of limitations would run.

Account stated; certificate of overassessment; implied promise of payment.—In determining whether a certificate of overassessment constitutes an account stated, all the items appearing in the certificate must be considered as making up the account; and the implied promise of the Government to refund the overpayment shown by the certificate applies only to the balance remaining after the credits shown have been deducted.

Same; erroneous conclusion in certificate of overassessment; statute of limitations.—Where a certificate of overassessment showed the total assessment for the year involved, the amount of the tax liability for the year, and the resulting overassessment and net overpayment, it constituted an account stated in favor of the taxpayer for the amount of the overpayment, notwithstanding an erroneous statement in the certificate that refund of the overpayment was barred by the statute of limitations, and a claim for refund based thereon was within the jurisdiction of the court where suit was brought within six years after delivery of the certificate of overassessment.

The Reporter's statement of the case:

Mr. Raymond F. Garrity for the plaintiff.

Mr. George W. Billings, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff, a resident of Freeport, Maine, duly filed his income tax returns for the years 1917, 1918, and 1919, and paid the taxes due thereon.

His return for the year 1919 disclosed a tax liability of $10,634.44, which amount was paid as follows:

May 14, 1920	$3,736.00
May 19, 1920	1,581.22
September 16, 1920	1,959.39
December 15, 1920	3,357.83
	10,634.44

For each of the years 1917, 1918, and 1919, plaintiff in his returns took a deduction of $20,000 losses sustained in connection with a rock-crushing plant located at San Fernando, California, in which he had invested $100,000, and which he himself operated until June 1916.

Plaintiff's income for the years 1917, 1918, and 1919, was principally derived from his distributive share of the income of the American Hoist & Derrick Company, St. Paul,

Minnesota, of which partnership he was a member. The partnership also filed income tax returns for the years 1917, 1918, and 1919.

2. The Commissioner of Internal Revenue audited plaintiff's income tax returns for 1917, 1918, and 1919, as a unit, and in a letter dated January 24, 1925, advised plaintiff that the deductions of $20,000 in each year on the rock-crushing plant were disallowed on the ground that he had failed to produce the necessary data to substantiate the deductions.

The Commissioner likewise in this letter notified plaintiff of proposed deficiency assessments in taxes of $1,481.49 for 1917, $11,146.56 for 1918, and $16,888.99 for 1919.

The Commissioner also in the letter of January 24, 1925, requested plaintiff to file extension waivers for the years 1917 and 1918, and an original waiver for 1919, which would extend the period of limitations for the collection of taxes for 1917 to April 1, 1926, and for the years 1918 and 1919 to March 15, 1926.

3. At the time the Commissioner requested the waivers referred to in the preceding finding, plaintiff was on a world cruise and the letter was referred to his attorney-in-fact, one William C. Prentiss, now deceased, who at that time represented plaintiff before the Bureau of Internal Revenue by virtue of a power of attorney executed by plaintiff and then on file in the Bureau. Plaintiff's attorney-in-fact executed the waivers requested, and on February 1, 1925, presented them to the chief of the Personal Audit Division of the Income Tax Unit who refused to accept them on the grounds that under regulations promulgated by the Commissioner it was necessary for the taxpayer himself to sign the waivers. The power of attorney referred to is hereby made a part of this finding by reference.

4. The Commissioner of Internal Revenue in a letter dated March 2, 1925, advised plaintiff that an immediate assessment of the additional taxes proposed in his letter dated January 24, 1925, would be made in accordance with section 274 (d) of the Revenue Act of 1924.

Jeopardy assessments of $27,517.04 for the years 1917, 1918, and 1919 were thereafter made, the additional assessment for the year 1919 being $16,888.99.

On July 2, 1925, plaintiff received notice and demand from the Collector of Internal Revenue for the additional taxes thus assessed, and within the time in which he was permitted by law to do so filed claims for abatement of the taxes for each of the years.

A brief in support of his abatement claims was filed by the plaintiff in which depreciation of $6,583.00 on the rock-crushing plant referred to in Finding No. 1 was claimed for each of the years 1917 and 1918, and a deduction of $68,-020.25 was claimed for 1919 as loss sustained upon the sale of the rock-crushing plant in that year.

5. On October 23, 1925, the Commissioner issued his so-called sixty-day letter covering the years 1917, 1918, and 1919. The letter stated that a deduction of $6,583.00 representing depreciation on the rock-crushing plant was allowed for each of the years 1917 and 1918, and that a deduction of $67,520.25 representing loss on the sale of the rock-crushing plant had been allowed for the year 1919.

The letter showed a tax liability for 1917 of $813.63 and an overassessment of $740.84. Since only $72.98 had been paid by the plaintiff, the effect was to disclose a deficiency of $740.65. The letter showed a tax liability for 1918 of $9,719.53 and an overassessment of $2,300.35. Since only $873.32 had been paid by the plaintiff, the effect was to disclose a deficiency of $8,846.21. The letter disclosed a tax liability for 1919 of $3,054.08 and an overassessment of $24,-469.35. Since plaintiff had paid $10,634.44 for 1919, there resulted an overpayment of $7,580.36. The letter stated that the overpayment was barred from allowance by the statute of limitations, inasmuch as no waiver or claim for refund was filed prior to March 15, 1925, and that the amount of $16,888.99 of the assessment for 1919 would be abated.

6. Plaintiff, on December 21, 1925, filed a petition with the Board of Tax Appeals for a review of the Commissioner's determination of deficiencies in taxes for the years 1917 and 1918, relating solely to the question arising out of the determination of the income of the American Hoist & Derrick Co.

On March 13, 1926, plaintiff filed a claim for refund for the year 1919.

On August 19, 1926, while plaintiff's appeals for the years 1917 and 1918 were pending before the Board of Tax Appeals, the Commissioner addressed plaintiff the following letter in respect to his claim for refund for the year 1919:

> Reference is made to your claims for the refunding of $10,634.14 and $32.19, income taxes assessed for the years ended December 31, 1919, and 1920, respectively.
>
> The records of this office indicate that a petition involving the above-mentioned years has been filed by you with the United States Board of Tax Appeals. Inasmuch as that body will determine your tax liability upon the basis of the petition, your claims will be rejected on the next schedule for your district to be approved by the Commissioner.
>
> The contentions set forth in your claims may, of course, be presented before the Board of Tax Appeals.

The refund claim was thereafter rejected on a schedule dated October 12, 1926.

7. The Board of Tax Appeals decided the appeals for the years 1917 and 1918 on August 9, 1928. The Board's decision was based on a stipulation entered into by the parties and filed with the Board. This stipulation not only covered the years 1917 and 1918, but also agreed upon plaintiff's tax liability for the years 1919 and 1920.

The Commissioner, following the Board's decision as to the years 1917 and 1918, readjusted the taxes for those years in conformity with the decision, and also readjusted the tax liability for 1919 to conform to the stipulations referred to.

The Commissioner, on August 31, 1928, issued certificates of overassessments for the years 1917, 1918, and 1919. The certificate of overassessment for the year 1919 was delivered to plaintiff on September 30, 1928, and showed a tax liability of $2,943.77 for the year and an overassessment of $24,579.66, of which amount $16,888.99 was stated in the certificate to be allowed and was abated on September 26, 1928. Since the plaintiff had paid $10,634.44 there resulted an overpayment for 1919 in the amount of $7,690.67. The certificate stated that the overpayment of this amount was barred from refund by the statute of limitations, inasmuch as no waiver or claim for refund was filed within the statutory period.

8. After the final action of the Commissioner for the years 1917, 1918, and 1919, demand for the deficiency in taxes resulting therefrom, covering the years 1917 and 1918, was made by the Collector of Internal Revenue on October 3, 1928. On November 3, 1928, plaintiff submitted an offer in compromise to the Commissioner through the Collector of Internal Revenue in the amount of $780.61, which amount represented the difference between the additional tax demanded by the collector for those years and the overpayment of $7,690.67 for the year 1919, namely, $726.04, plus interest of $54.57. The Commissioner of Internal Revenue rejected the offer in compromise by letter dated February 21, 1930, and on March 5, 1930, plaintiff paid the deficiency taxes for the years 1917 and 1918, plus interest thereon.

The overpayment of $7,690.67 for the year 1919 is the direct result of allowing as a deduction the entire loss of $67,520.25 on the rock-crushing plant instead of the $20,000 deducted from income in the income tax return theretofore filed by plaintiff for the said year. The deficiency in tax for the year 1918 to the extent of $5,600.46, and for the year 1917 the entire deficiency of $110.02, is the direct result of having disallowed in those years the $20,000 loss deducted from income in the income tax returns theretofore filed by plaintiff for the said years.

9. On April 13, 1929, plaintiff filed a claim for refund for $7,690.67 for the year 1919, which purported to amend a prior informal claim. This claim was rejected by the Commissioner on May 16, 1930.

The court decided that plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover the sum of $7,690.67 income taxes for the year 1919, together with interest thereon.

It is contended by plaintiff that the certificate of overassessment delivered to him on September 30, 1928, constituted an account stated in his behalf for the sum of $7,690.67, and the suit is based on such account. It is conceded that the plaintiff overpaid his taxes for the year in the amount claimed, and if the certificate of overassessment constituted

an account stated plaintiff is entitled to recover, as suit was instituted within six years after the delivery of the certificate.

The defendant contends (1) that the certificate of overassessment did not constitute an account stated, and (2) that a refund of an overpayment of taxes for the year 1919 was barred by the statute of limitations on the date of the issuance of the certificate. Defendant's contention in respect to the bar of the statute of limitations will be first considered.

The relevant facts disclose that plaintiff duly filed his income tax returns for the years 1917, 1918, and 1919 and paid the taxes due thereon. For each of the years he took a deduction of $20,000 for losses claimed to have been sustained during those years in connection with a rock-crushing plant. Upon an audit of the returns for the three-year period the Commissioner disallowed the deduction for each of the years and on March 14, 1925, made additional assessments for each of the years. Plaintiff, upon receipt of notice and demand from the collector for the additional taxes referred to, filed claims for the abatement of the taxes. After consideration of the claims for abatement of the taxes the Commissioner on October 23, 1925, issued his so-called sixty-day letter advising plaintiff of the final determination of his tax liabilities for the years 1917, 1918, and 1919. The sixty-day letter disclosed deficiencies for the years 1917 and 1918 and an overassessment for 1919. The letter advised plaintiff that $16,888.99 of the assessment for 1919 would be abated and that the balance was barred from allowance by the statute of limitations "inasmuch as no waiver or claim for refund was filed prior to March 15, 1925." Plaintiff thereupon, on December 21, 1925, filed a petition with the Board of Tax Appeals for a review of the Commissioner's determination of deficiencies for the years 1917 and 1918 and on March 13, 1926, filed a claim for refund for the year 1919. The Board of Tax Appeals decided the appeals for the years 1917 and 1918 on August 9, 1928. The Board's decision was based upon a stipulation entered into by the plaintiff and the Commissioner as to the tax liability for the years 1917 and 1918, which stipulation also agreed upon the tax liability for the years 1919 and 1920. The Commissioner then adjusted the taxes for the years 1917 and 1918 to conform

to the Board's decision and readjusted the 1919 taxes to conform to the stipulation in respect to the tax liability for that year, and on August 31, 1928, issued a certificate of overassessment for the year 1919, upon which suit is brought, it being delivered to plaintiff on September 30, 1928. On the certificate was an overassessment for the year of $24,579.66, of which amount it is stated $16,888.99 was allowable, and the balance of $7,690.67 was barred by the statute of limitations.

The facts further disclose that the Commissioner on January 24, 1925, requested plaintiff to file a waiver for the year 1919; that plaintiff at that time being absent on a world cruise, his attorney-in-fact, under the authority of a power of attorney [1] then on file in the Bureau, executed on behalf of plaintiff the waiver requested by the Commissioner and presented it to the Bureau on February 1, 1925, and that the chief of the Personal Audit Division of the Income Tax Unit to whom it was presented refused to accept it, stating that under the regulations promulgated by the Commissioner it was necessary for the taxpayer himself to sign it in person.

The statutory period within which plaintiff could file a claim for refund for the taxes for 1919 expired on March 15, 1925, unless he filed a waiver in respect of the taxes due for that year, in conformity with section 284 (g) of the Revenue Act of 1926, in which case the time in which he might file a claim for refund was extended to April 1, 1926. This section reads:

> Credits and Refunds. * * * If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim

[1] The power of attorney reads as follows:

Know all you by these presents that I, Henry Stanley Wood, of Freeport, Maine, hereby constitute and appoint William C. Prentiss, of Washington, D. C., my true and lawful attorney, for me and in my name and stead, to represent and act for me before the Bureau of Internal Revenue and Treasury Department of the United States in any and all matters in which I am concerned and particularly in the matter of my income tax returns and assessment of taxes thereon, hereby granting unto said attorney full power and authority to act in and concerning the premises as fully and effectually as I might do if personally present.

Witness my hand and seal this 11th day of Dec. A. D. 1923.

(signed) Henry Stanley Wood.

therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. * * *

The defendant in support of its contention that the statute of limitations bars recovery, takes the position that the waiver executed by plaintiff's attorney-in-fact and presented to the Bureau on February 1, 1925, was invalid and did not operate to extend the statutory period beyond March 15, 1925, and that hence the refund claim of March 13, 1926, was filed out of time.

We think the waiver was valid. It was executed by plaintiff's attorney-in-fact under the power of attorney set out in the margin. While the power of attorney did not in precise words grant authority to Prentiss to execute and sign income tax waivers on behalf of plaintiff, undoubtedly such authority was included in the words: "particularly in the matter of my income tax returns and the assessment of taxes thereon, hereby granting unto said attorney full power and authority to act in and concerning the premises as fully and effectually as I might do if personally present." The power granted in these broad and sweeping words must be held to have authorized plaintiff's attorney to execute and file the waiver in question, *Vanderlip* v. *United States*, 79 C. Cls. 489, 6 Fed. Supp. 965.

In construing section 281 (e) of the Revenue Act of 1924, the language of which, except as to dates, is identically the same as the pertinent provisions of section 284 (g) of the 1926 act, the Bureau of Internal Revenue (C. B. Vol. IV, page 1) ruled:

> As this section merely requires the filing of a waiver on or before June 15, 1924, it is evident that the taxpayer has done everything required of him when he files the waiver within the prescribed time. An acceptance of the waiver by the Commissioner is, accordingly, not necessary for the purpose of bringing the case within the provisions of this section.

Applying this construction of the 1924 Act to section 284 (g) of the 1926 Act, and we think it is a correct construction, it is clear that when the plaintiff presented, within the time prescribed, a validly executed waiver to the Commis-

sioner he had done all that was required of him to secure the benefits offered by the section. He had filed a waiver within the meaning of the section which it was the plain duty of the Commissioner to receive and place in the files with the other papers in the case. The plaintiff can not be deprived of the benefits afforded him by the statute because of the failure of the Commissioner to perform this duty. It was not necessary under the ruling of the Bureau that the Commissioner accept the waiver to bring it within the meaning of section 284 (g). The waiver, therefore, must be given the same force and effect as would have been accorded to it had it been accepted by the Commissioner and placed on file in the Bureau. It operated to extend the statutory period for the year 1919 to a date beyond the issuance of the Commissioner's sixty-day letter of October 23, 1925, and also beyond the date of the filing of the claim for refund, March 13, 1926. The Commissioner was therefore in error in his statement in the sixty-day letter that the overpayment for 1919 disclosed therein, was barred from allowance by the statute of limitations.

While plaintiff's suit is not based on the Commissioner's disallowance of the claim for refund his action in respect to the claim bears directly on the question of whether the allowance of the overpayment was barred by the statute of limitations on the date of the issuance of the certificate of overassessment, August 31, 1928. The Commissioner in his sixty-day letter, as we have seen, proposed deficiencies for the years 1917 and 1918, and disclosed an overassessment for the year 1919. The plaintiff filed his petition with the Board of Tax Appeals for a review of the Commissioner's determination in respect to the years 1917 and 1918. The appeal for 1917 and 1918 involved solely the income of a partnership from which plaintiff's income for those years and also for 1919 arose. It was therefore impossible to determine plaintiff's correct income for 1919, and the resulting overassessment, until the Board had entered its decision in respect to the years 1917 and 1918, and the Commissioner took no further action in that respect until after the Board's determination of the tax liability for those years, August 9, 1928, when on August 31, 1928, he issued the certificate of over-

assessment for 1919 upon which suit is based, disclosing an overassessment of $24,597.66, and an overpayment of $7,690.67. However, while the appeal for the years 1917 and 1918 was pending before the Board, the Commissioner of Internal Revenue, on August 19, 1926, wrote plaintiff the following letter:

> Reference is made to your claims for the refunding of $10,634.14 and $32.19, income taxes assessed for the years ended December 31, 1919, and 1920, respectively.
>
> The records of this office indicate that a petition involving the above-mentioned years has been filed by you with the United States Board of Tax Appeals. Inasmuch as that body will determine your tax liability upon the basis of the petition, your claims will be rejected on the next schedule for your district to be approved by the Commissioner.
>
> The contentions set forth in your claims may, of course, be presented before the Board of Tax Appeals.

It is obvious that the Commissioner's letter was based on an erroneous assumption of fact, as the plaintiff did not file a petition with the Board of Tax Appeals from the Commissioner's determination of his tax liability for 1919 as disclosed in the Commissioner's sixty-day letter, nor did the Board at any time have jurisdiction to pass on the refund claim for that year. In these circumstances the Commissioner's rejection of the claim was of a tentative character at most. The only fair inference that can be drawn from the letter is that a final determination of plaintiff's tax liability for 1919 would await the outcome of appeals then pending before the Board for other years. It clearly was not the intention of the Commissioner to disallow the refund claim on the merits, and he did not do so, as shown by his statement to plaintiff: "The contentions set forth in your claims may, of course, be presented before the Board of Tax Appeals." The Commissioner, in fact, declined to consider and determine the contentions set forth in the claim for refund on the erroneous assumption that they would be considered and determined by the Board of Tax Appeals. This conclusion is inescapable when the Commissioner's letter is considered in connection with the fact that in a stipulation between the Commissioner and the plaintiff sub-

sequently entered into in respect to the appeals then pending before the Board for the years 1917 and 1918 the tax liability for the years 1919 and 1920 was also recomputed, in which recomputation an overassessment of $24,579.66 was shown for 1919. The purported disallowance of the claim in these circumstances was ineffective and did not constitute a rejection of the claim within the meaning of the statute. Since this was the only action on the refund claim prior to the issuance of the certificate of overassessment on August 31, 1928, the claim was pending on that date, and the allowance of the overpayment shown in the certificate was not barred by the statute of limitations.

The defendant contends that the certificate of overassessment can not be considered as an account stated importing a promise of payment on the one side and acceptance on the other, for the reason that plaintiff was advised in the certificate that a refund of the overpayment shown was barred by the statute of limitations. In other words, it is urged that the express statement in the certificate that the overpayment was barred from refund because of the statute of limitations negatives the implication of a promise on the part of the Government to refund the amount of the overpayment, which is one of the essentials of an account stated. In support of its contention the defendant cites *Stearns* v. *United States*, 291 U. S. 54; *Daube* v. *United States*, 289 U. S. 367, and numerous decisions of this court in which the principles underlying an account stated are laid down. The facts in the cited cases are in each instance clearly distinguishable from the facts in the instant case. The certificates of overassessments in the cited cases show that all or portions of the overpayments shown had been credited against unpaid taxes for other years, claimed by the taxpayer to have been barred from collection when the credit was made. In each of the cases relied upon recovery was sought of amounts thus credited. The essence of the decisions is that all the items appearing on a certificate of overassessment must be considered as making up the account and that a promise of the Government to refund the overassessment shown in the

certificate applies only to the balance remaining after the credits shown have been deducted. The rule is aptly stated in *Holmes Manufacturing Co.* v. *United States*, 79 C. Cls., 263, 6 Fed. Supp. 438, where the court said:

> It is quite obvious there was no account stated in favor of plaintiff except for the balance shown. The amount of this balance was paid, leaving nothing due as the account was stated. Plaintiff seeks to take the one item of the account which showed the amount of the over-assessment and ignore the credits and the refund made on the other side of the account. We have repeatedly held that this cannot be done, and without citing all of the many cases that support our holding, would call attention particularly to *R. H. Stearns Co.* v. *United States*, 291 U. S. 54; *Leisenring* v. *United States*, 78 C. Cls. 171 (certiorari denied); and *Samuel Daube* v. *United States*, 78 C. Cls. 754.

The certificate of overassessment in the instant case sets forth (1) a total assessment for the year 1919 of $27,523.43, (2) a tax liability for the year of $2,943.77, and (3) an over-assessment for the year of $24,579.66. It is then stated that $16,888.99 of the overassessment is allowable and that $7,690.67 is barred by the statute of limitations. The latter amount, which was an overpayment, was the balance struck in the account as stated in the certificate. There was then, and is now, no controversy between the parties as to the correctness of this balance. No credits are involved and the only grounds on which the Government seeks to retain the overpayment is that a refund thereof was barred by the statute of limitations when the certificate was issued, which is not the fact. In these circumstances the certificate of overassessment constituted an account stated of an over-payment of taxes by plaintiff in the sum of $7,690.67 for the year 1919, and an implied promise on the part of the Government to refund it to plaintiff, notwithstanding the erroneous statement in the certificate that the refund was barred by the statute of limitations. *Shipley Construction & Supply Co.* v. *United States*, 79 C. Cls. 736, 7 Fed. Supp. 492; *Frank H. Gage* v. *United States*, decided May 4, 1936, 83 C. Cls. 381, 14 Fed. Supp. 500.

Syllabus

The plaintiff having instituted this suit as upon an account stated, within six years after the certificate of overassessment was delivered to him, is entitled to recover, and is hereby awarded judgment in the sum of $7,690.67, together with interest thereon as provided by law.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

IN RE CLAIM OF LIEUTENANT COLONEL JOHN N. HODGES

[Departmental No. 170. Decided January 11, 1937]

On the Proofs

Departmental reference; jurisdiction of the court to render judgment.—The Court of Claims has jurisdiction to render judgment in a claim before it on a Departmental reference with the consent of the claimant and where it appears upon the facts that the court has jurisdiction under existing law to render judgment.

Transportation of Army officer's property on change of station; Government liability for general average contribution incident to transportation.—Where the Government, being under legal obligation for transportation of an Army officer's property on his change of station, and with full authority to determine the method and route of shipment, made the shipment, for the purpose of Government economy, partly by rail and partly by water instead of by the much shorter all-rail route, and without insurance or other protection against marine risk, it is liable to the officer for contribution in general average accruing against the property or officer as a result of marine loss incident to such shipment; and it is immaterial to the officer's right of recovery that such general average contribution has not yet been paid by him.

Same.—Where the Government, under its obligation for transportation of personal property of an Army officer on his change of station, ships the property partly by water, general average contribution accruing against the property or officer as a result of marine loss incident to such transportation may properly be considered a contingent part of the cost of the transportation, and of the Government's liability therefor.

The Reporter's statement of the case:

Mr. J. Frank Staley, with whom was *Mr. Assistant Attorney General Angus D. MacLean*, for the United States.

The court made special findings of fact as follows:

1. The claimant is and was at the times hereinafter mentioned a commissioned officer of the United States Army, in the Corps of Engineers, with rank of lieutenant colonel.

2. On March 23, 1931, the War Department issued the following order:

SPECIAL ORDERS No. 68 — WAR DEPARTMENT, WASHINGTON, *March 23, 1931.*

* * * * *

33. Par. 2, S. O. 57, W. D., 1931, relating to Lieutenant Colonel *John N. Hodges*, Corps of Engineers, is amended to read as follows: Lieutenant Colonel *John N. Hodges*, Corps of Engineers, is relieved from his present assignment and duty in the office of the Chief of Engineers, Washington, D. C., effective at such time as will enable him to comply with this order, and will proceed at the proper time to New Orleans, Louisiana, to arrive not later than April 10, 1931, and take station as district engineer, 2nd New Orleans engineer district. The allowances connected therewith, including crating and shipment of household goods and transportation of dependents, are chargeable to river and harbor funds, allotted to the 2nd New Orleans engineer district in accordance with section 5, River and Harbor Act, approved March 3, 1925.

BY ORDER OF THE SECRETARY OF WAR:

DOUGLAS MACARTHUR,
Chief of Staff.

OFFICIAL:

JAMES F. MCKINLEY,
Brigadier General,
Acting The Adjutant General.

3. Claimant thereafter, and on or before April 29, 1931, surrendering control and possession thereof, delivered to the quartermaster at Washington, D. C., for shipment pursuant to this order to New Orleans, La., certain household

goods and books, weighing 13,088 pounds, and the shipping quartermaster on that date delivered them to the Pennsylvania Railroad at Washington, D. C., directing shipment to New Orleans, La., by way of that railroad and the Morgan Line, consigned to the claimant, using for that purpose Government bill of lading No. WQ-240923, a copy of which is filed in the case as exhibit no. 5c and is hereby made part of this finding by reference.

The goods were forwarded by rail to the port of New York, thence aboard the *El Capitan*, a steamship of the Southern Pacific Steamship Lines (Morgan Line).

The Quartermaster General received and shipped Lieutenant Colonel Hodges' property in accordance with the provisions of AR 30-905, August 1, 1929, paragraph 2, pertinent part of which is as follows:

"2. *Responsibility for, and jurisdiction over, transportation.—a.* The Quartermaster General is responsible for the supervision and direction of all matters connected with the transportation of the personnel and property of the Army by land and water, and is also designated as War Department traffic manager and will exercise jurisdiction over all transportation activities of the War Department."

Colonel Hodges had no jurisdiction or power to determine how his property should be shipped by the quartermaster, i. e., whether by all rail or rail and water, that power being resident in the Quartermaster General.

The quartermaster routed the shipment as indicated because of the decision of the Comptroller General in the case of Major John V. Littig, M. C. (A-31809, June 3, 1930), in which it is stated:

> "To accomplish shipment via the cheaper rail-ocean-rail route the issue of one bill of lading only is required * * *. All officers of the Government are required to secure the rendition of services for the Government at the lowest cost consistent with the services required; none is authorized to select a more expensive service without showing the necessity therefor."

The shipment was made over a much longer course and a more hazardous route than rail shipment would have involved between the two points and all for monetary reasons

beneficial to the Government and apparently without advantage to Lieutenant Colonel Hodges.

4. The S. S. *El Capitan* sailed from New York May 6, 1931. On May 10, 1931, at about 3:00 a. m., fire was discovered in cargo located in the after end of the ship, imperiling ship, cargo, and crew. The vessel's fire-fighting equipment was put into commission and the fire brought under control, but upon docking the night of May 12–13, 1931, the fire was still burning vigorously, and it was necessary to flood and there was flooded the whole after end of the ship, thereby extinguishing the blaze. In extinguishing the blaze claimant's goods were necessarily damaged or destroyed by steam and water.

5. The ship's owners promptly gave notice to claimant of the disaster; that as a result thereof sacrifices and expenditures of a general average nature had been and would be incurred; that they had appointed Marsh & McLennan, of New York City, average adjusters; and that before cargo could be delivered it was necessary that they have (1) a properly executed average agreement; (2) a cash deposit of 30% of the invoice value of the merchandise, or in lieu thereof the guaranty of an American insurance company; and (3) a certified copy of invoice.

The claimant requested the local representative of the Quartermaster General at New Orleans to execute the general average agreement, which request was refused. A representative of the Quartermaster General at New Orleans did sign the general average agreement in the case of another consignment aboard the same vessel, shipped to the commanding officer, New Orleans Quartermaster depot.

Thereupon claimant, in the belief that by so doing it was necessary to preserve his property and limit subsequent damage, signed the agreement.

A copy of the agreement is filed in the case as part of exhibit no. 1 and is made part hereof by reference.

6. The ship's cargo was landed, surveyors appointed, and claimant's property duly appraised and found to have a landed value of $13,016.03, and to have been damaged to the extent of $3,903.16 by reason of the efforts to extinguish the fire.

Reporter's Statement of the Case

A statement of general average was prepared by the average adjusters, who on or about January 11, 1933, submitted the following statement to claimant:

General average

$16,919.19 at 49.42931% pays		$8, 363. 04
Receives:		
Allowance	$3, 903. 16	
Interest on allowance	300. 87	
Proceeds of sale	5. 78	
Interest on same	. 05	
		4, 209. 86
Balance to pay		4, 153. 18

Demand has been made and continues to be made upon claimant by the owners of the vessel for payment of the balance of $4,153.18, and claimant has not paid the whole or any part thereof.

7. On July 11, 1931, claimant presented a claim to the owners of the vessel in the amount of $3,479.40, on account of loss and damage to his goods while in transit aboard the S. S. *El Capitan*, which was rejected October 28, 1931, the owners disclaiming liability under the terms of the bill of lading, and calling attention to the general average situation.

8. On November 5, 1931, claimant presented claim to the Army Cooperative Fire Association for reimbursement of his damages and on December 21, 1931, recovered therefrom by way of insurance $3,870.36.

9. November 6, 1931, claimant submitted to the War Department claim for such relief as might be due him under the provisions of Army Regulations 35–7100. A board of three Army officers was, on February 27, 1932, appointed by the Mississippi River Commission, War Department, under the provisions of A. R. 35–7100 to consider and report upon the claim. On March 28, 1932, the board so constituted found that claimant had suffered damage to the extent of $3,870.36, and in its report made to the Chief of Finance, U. S. Army, stated: "It is believed that the Government should assume full responsibility for this damage and should relieve the claimant of all liability resulting from the general average assessment."

On or about August 10, 1932, a board of three Army officers in the Finance Department, U. S. Army, examined the claim of the claimant, and found, among other things, that claimant was requesting that he be reimbursed the difference, $1,210.64, between the amount then estimated by the average adjusters as contributable in general average, $5,121.80, and the allowance due him therein for damage, $3,911.16; that the claim did not come under any of the provisions of the Act of March 4, 1921, 41 Stat. 1436; and that the claim should be disallowed. These findings were approved by the Chief of Finance, U. S. Army, and the claim by him referred to the Secretary of War with the suggestion that it be referred to this court for a decision as to legality of payment. On or about November 3, 1932, the Secretary of War transmitted to this court, with numerous documents in the case deemed by him to be pertinent, a request for a decision on each of the following points:

> First, can the Secretary of War consider the general average assessment as a proper item of loss, allowable under the third provision of the Act of March 4, 1921.
>
> Second, may the Secretary of War allow the full damages proved to have been sustained by Lieutenant Colonel Hodges' property under the third provision of the act of March 4, 1921, and in addition thereto allow any difference between the amount of the general average assessment and the amount allowed as a charge against the fund collected by such assessment.
>
> Third, under the facts as set out would Lieutenant Colonel Hodges be entitled to receive $5,121.80 paid by him as a general average assessment as the net loss sustained by reason of the sea disaster and be permitted to retain any contribution for the loss of his property from such general average.

10. On May 7, 1934, there was filed in this court in this case claimant's petition for recovery from the United States of $4,153.18, being the balance set out in finding 6 herein, together with such relief as equity and justice might require.

The court decided that plaintiff was entitled to recover.

Opinion of the Court

WILLIAMS, *Judge*, delivered the opinion of the court:

This claim is before the court on a reference from the War Department under section 148 Judicial Code (U. S. C., title 28, section 254), which provides for judgment in the case if the reference of the claim was with the consent of the claimant, or it appears that upon the facts the court has jurisdiction under existing law to render judgment. These prerequisites to judgment are met and satisfied by the facts and the applicable law in the case.

Subsequent to the reference of the claim to the court, and pursuant to a request by the court on the War Department for a statement by the claimant as to the amount of his claim and, among other things, information as to whether the claim was transmitted to the court with the claimant's consent, a petition by the claimant addressed to the court, in due substance and form, and containing, *inter alia*, the information requested by the court and asking for judgment for the amount of the claim, was transmitted by the Department to the court. This petition, however, whether or not it be considered properly before the court as a petition of claimant in the case, adds nothing to the jurisdiction of the court to render judgment in the case, since, as indicated above, the court has jurisdiction to render judgment under the Departmental reference.

The claimant, Lieutenant Colonel John N. Hodges, Engineer Corps, United States Army, pursuant to an order of March 23, 1931, for change of station from Washington, D. C., to New Orleans, La., and to Army Regulations relative to transportation of officers' property on change of station, delivered to the Quartermaster of the Army at Washington his household goods and other property for transportation to New Orleans.

The authority to determine the manner and route of transportation of such property being in the Quartermaster General, it was shipped by the Quartermaster Department by rail to New York, and thence by water to New Orleans, consigned to the claimant. Shipment by this route was because of a decision of the Comptroller General that services for the Government must be made at the lowest cost

consistent with the service rendered, the cost of transportation being lowest by this route; and it was made without notice to claimant of the manner or route of shipment, and also without insurance of the property or other protection against marine risk. On the voyage fire broke out in the hold of the vessel, as a result of which claimant's goods, among others, were greatly damaged. The Quartermaster Department having refused to execute the general average agreement requisite to delivery of the shipment by the carrier, claimant was compelled to execute the agreement himself in order to secure delivery and possession of his property. Subsequently, in the resulting general average proceedings, the general average contribution chargeable against the property was determined to be $8,363.04, and the allowable loss for damage to the property to be $4,209.86, leaving a net balance and liability for general average contribution of $4,153.18, which is demanded of claimant, and which, though not yet paid by him, claimant here seeks to recover, the Government having refused to pay it. Claimant has received payment from fire insurance carried by him for the damage to his property, and therefore is claiming here only for the $4,153.18 balance of the general average liability charged against him.

The claimant has offered no brief or argument in the case, and the Government does not in fact contest the claim, merely presenting in its brief an impartial consideration of the case and the question of claimant's right of recovery.

The allowance of this claim seems predicable upon either of two bases. First, the Government, under the statutes and Army Regulations, was obligated for the transportation of claimant's property on his change of station. Act of May 28, 1930, 46 Stat. 439; Army Regulations 30–905, paragraph 2, August 1, 1929; Army Regulations 30–960, paragraphs 9, 11, September 20, 1927; *Id.*, paragraphs 13, September 20, 1928; and paragraphs 10 (a) and 10 (b) of Change 1, June 29, 1929.

The Government's obligation for such transportation is so clear and well established as not to admit of question; and its authority and responsibility in the determination of the

Opinion of the Court

manner and route of transportation is equally clear from the following provision of Army Regulations 30–905, *supra:*

> "The Quartermaster General is responsible for the supervision and direction of all matters connected with the transportation of the personnel and property of the Army by land and water, and is also designated as War Department traffic manager and will exercise jurisdiction over all transportation activities of the War Department."

Therefore, being under obligation for the transportation, with full authority to determine the manner and route of the shipment, and having, for the purpose of Government economy, shipped the property by a more hazardous route, and without notice thereof to the claimant or the usual protection against the extra hazard of marine risk, including liability in general average, the Government must be held liable for the resulting loss or liability of the claimant.

In the case of *R. P. Andrews & Co.* v. *United States*, 41 C. Cls. 48, 207 U. S. 229, the Government purchased of Andrews & Co. a quantity of paper to be delivered f. o. b. Manila, P. I., the cost of transportation, however, to be borne by the Government and the carrier designated by the Government, for saving in cost of transportation. The shipment was damaged in transit, and in the suit by Andrews & Co. to recover the purchase price it was held that the transportation risk was that of the Government. While this case is not in all respects analogous to the case at bar, it is sufficiently so to materially support a judgment for the claimant's loss or liability in general average here.

In the case at bar, when the Government, under obligation and with full control and authority for transportation of the property, accepted and shipped it, the carrier was the agent of the Government, and the risk of the transportation, including possible or contingent liability for general average, was the risk of the Government, and it was therefore liable to the claimant both for the damage to the property and for the liability in general average.

We think, also, that claimant can be held to have a second ground of recovery on the basis of the general average assessment and liability being a contingent part of the cost of the

transportation for which the Government was liable. When the Government, being liable for the transportation, accepted the property for transportation and, for economy to itself, elected to ship it by a route and under an affreightment agreement which made it liable for a possible or contingent additional charge in the way of general average, this additional charge was in effect a part of the cost of transportation for which the Government was liable, and should be so held.

This additional cost of the transportation should therefore have been met by the Government in the general average adjustment, and when the Government refused to assume and meet it and thereby compelled the claimant to assume it by execution of the general average agreement in order to recover his property, he is entitled to recover this portion of the cost of transportation which the Government has failed and refused to pay.

And it is immaterial to the claimant's right of recovery in this case that he has not yet paid this balance of the general average assessment for which he sues, for his execution of the general average agreement rendered him liable for its payment. In the cases of *Pneumatic Gun Carriage Co.* v. *United States*, 36 C. Cls. 71, and *Leary Construction Co.* v. *United States*, 63 C. Cls. 206, involving this same general principle, this court held that payment by a prime contractor to his subcontractor for extra work for which the Government was liable to the prime contractor was not a condition precedent to suit and recovery therefor by the prime contractor against the Government. So here it is not essential to recovery by claimant that this liability for general average first be paid by him.

The claimant's right of recovery here is strongly supported by the equity in the case growing out of the facts that the ocean transportation, with its increased hazards and lack of liability of the carrier therefor, was chosen by the Government for its own saving in the cost of the transportation, and without notice to the claimant or insurance or other protection against marine or other risk, loss, or liability.

The claimant having received compensation, from fire insurance carried, for the damage to the property, makes no claim for damage, and claims only for the $4,153.18 of the

general average liability claimed by the carrier, after deduction of the general average allowance for the damage sustained, and this amount he is entitled to recover.

Plaintiff is therefore awarded judgment in the sum of $4,153.18. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

STANDARD REFRACTORIES COMPANY, A CORPORATION, v. THE UNITED STATES

[No. K-61. Decided February 8, 1937]

On the Proofs

Income and profits tax; deduction for amortization of war time facilities.—Where war time facilities were used in the taxpayer's post-war business, the reasonable amortization deduction provided by the law is the difference between the depreciated war time cost of such facilities and their value as determined by their actual post-war use in the business.

Sale of corporation stock by stockholders not sale by the corporation.—Individual sales by the stockholders of the plaintiff corporation of all of the corporation stock, to another corporation, did not constitute a sale by the plaintiff of either its stock or its assets.

No deduction for amortization where no loss sustained.—The rule that where the taxpayer has disposed of particular war time facilities at a price equal to or in excess of their war time cost no amortization deduction from income is allowable, approved, but held not applicable under the facts in the case.

Allowance of amortization deduction for war time facilities where recovery of cost of facilities not shown.—Even if the sale of all of plaintiff's stock by its stockholders to another corporation and the subsequent taking over of plaintiff's assets by such corporation under a bill of sale constituted a sale by plaintiff of its assets, it would not be precluded from a deduction from income for amortization of its war time facilities unless it were shown that such facilities were included in such sale and it had therefrom recaptured their cost in whole or in part.

The Reporter's statement of the case:

Mr. Thomas G. Haight for the plaintiff. *Messrs. Robert H. Montgomery, Roswell Magill, Chester J. McGuire,* and *James O. Wynn,* were on the brief.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Robert H. Jackson,* for the defendant.

The court made special findings of fact as follows:

1. The plaintiff is a Pennsylvania corporation with its principal office at Philadelphia. It was organized in 1913, and immediately thereafter engaged in the manufacture of silica fire brick, and continued to be so engaged through the taxable years in question and down to and including a portion of the year 1922.

2. Silica bricks are composed of ganister rock of quartzite to which, in the process of manufacture, there has been added about 2 percent of lime. One of the principal characteristics of this kind of brick is the ability to resist high temperatures, and it is because of this that they are used extensively in the building of open-hearth furnaces used in the molding and refining of steel and in the construction of furnaces used in the molding and refining of copper. In these refining processes temperatures of 3,000° Fahrenheit are not unusual, and this intense heat, coupled with the destructive action of slag, tends to melt, break down, and destroy these silica brick so used as lining for furnaces, and it is necessary from time to time to repair the linings or reconstruct them completely. Silica brick is the only material which can be economically and efficiently used for lining such furnaces, and is almost indispensable in the refining of steel and copper, which two processes absorb approximately 85 percent of the total production.

3. In the silica-brick industry the kiln, with its complementary machinery and equipment, may be taken as a fair unit of measurement when determining the capacity of any particular plant. When the plaintiff commenced operations in 1913 its plant, situated at Claysburg, Pennsylvania, was composed of four kilns with the necessary supplementary

equipment. From its inception the company had a definite policy of expansion, which contemplated an ultimate maximum production of 50,000 bricks per day. As the business grew and developed it became apparent that the contemplated enlargement of the plant, pursuant to this policy, would be, in the years to come, wholly inadequate to meet the demands, and prior to April 6, 1917, its policy of expansion had been revised so that it contemplated a plant with a maximum production of 100,000 bricks per day. Subsequent to April 6, 1917, and as a result of the growth of its business during the war period, which for the purposes of this case may be said to have terminated on December 31, 1918, there was a further modification of the plans for plant expansion with a view to reaching ultimately a maximum production of 140,000 bricks per day.

4. Immediately after this country became an active participant in the World War the demand for silica brick increased with great rapidity and soon surpassed any demand which the industry had ever experienced. The abnormal demand for steel and steel products necessitated the continuance of operation of smelting and refining furnaces without the usual and customary intermissions for repairs and replacements. Because of this condition, the silica-brick linings of the furnaces were destroyed within comparatively brief intervals, with the result that replacements were required much more frequently than they would have been under normal operating conditions.

5. The plaintiff's business grew steadily, and pursuant to the plan of expansion additional kilns were constructed from time to time. By April 6, 1917, it had fourteen completed kilns and four additional kilns were under construction. Subsequent to April 6, 1917, and prior to December 31, 1918, the four kilns under construction were completed and two additional kilns were constructed. During the same period work was done on the other kilns; certain construction work was done on office buildings; extensions were made to stock sheds; the drying tunnels were extended; additional machinery was installed in the plant; additions were made to quarry equipment, including tracks, cars, etc.; and a num- of dwellings were erected for the use of laborers employed

at the plant. Some of these additional facilities so constructed, erected, installed, or acquired during the war period were supplemental to and necessary for the efficient operation of the facilities constructed, erected, installed, or acquired prior to April 6, 1917. The operation of the plaintiff's plant as it stood on April 6, 1917, required the employment of more laborers than could be accommodated by the housing facilities then available in the vicinity of the plant.

6. During the period from April 6, 1917, to the armistice, representatives of the Government from various departments and bureaus which were interested in the production of war materials frequently visited plaintiff's plant in an effort to induce its officers to increase its production to the maximum capacity of the plant. During the war period approximately 85 percent of the plaintiff's production was consumed by producers of steel, steel products, and other similar war materials, and an additional 10 percent thereof was consumed by producers of copper and copper products. During the war period the molding department was operated on the basis of three shifts in each 24 hours, and the other departments of the plant were operated on a night and day basis. Shipments of silica brick were made under class A-1 priority certificates issued by the War Industries Board, and the plaintiff, having been classified as an essential war industry, received shipments of fuel under that class of priority certificates.

7. The manufacture of silica brick by plaintiff contributed to the prosecution of the war against the Imperial German Government.

8. The cost of additions made by plaintiff during the period April 6, 1917, to December 31, 1918, was $493,795.68, as follows:

Plant and equipment	$354,781.12
Tenements	139,014.56
	493,795.68

Depreciation sustained on the above facilities to December 31, 1918, and which has heretofore been allowed to the plaintiff, was $41,119.98. The difference between the cost

of additions and the depreciation allowed was on December 31, 1918, $452,675.70. This cost of additions was borne in its entirety by the plaintiff. Included in the additions to plant and equipment was a modern power plant containing the latest and best kind of power-producing machinery. This power plant was more efficient than the old power plant and increased the production capacity of the plaintiff. Also, the office building, which had been a small wooden structure, was replaced by a larger and better brick building, the prior office building being utilized as a medical dispensary and for other purposes.

The plaintiff's business was the only industry in the vicinity of Claysburg. Under the stimulus of the wartime demand for its product the plaintiff greatly increased the number of its employees, with the result that during the war period the population of Claysburg increased from approximately 250 to approximately 1,200. At one time during the war period the company had on its pay roll between 840 and 850 employees. On April 6, 1917, the housing facilities in Claysburg, were inadequate and many of the employees lived in houses described as "shanties" and in tents. After that the shortage in housing facilities became more acute and the company found it necessary to construct numerous cottages and tenement houses. A part of this construction was intended to remedy the shortage existing on or before April 6, 1917. After the war the plaintiff made considerable reductions in the number of its employees, and as a result was able to rent only a few of the houses and tenements. Several of the cottages were offered for sale at prices as low as $100, but no purchasers could be found.

9. At the time of the signing of the armistice the plaintiff had on hand orders and contracts for a large number of silica brick. Almost immediately after that date the purchasers began to send in suspension orders and cancellations. Later practically all the suspended orders were superseded by cancellations. In many instances the production of the brick necessary for the filling of these orders and contracts had been started, and as a matter of economy the manufacture of these brick was completed, since it was cheaper to complete them than it was to discontinue manu-

facturing and break them up in order to salvage the raw materials.

10. Measured by the average production during the war period, plaintiff's plant as it stood on April 6, 1917, was capable of producing 100,000 bricks per day. With the addition of a small amount of supplementary equipment, the post-war demand for silica brick could have been supplied by the plant and equipment as it stood on April 6, 1917. The post-war production was not sufficient to have warranted the addition of all the facilities which were acquired to meet plaintiff's wartime demands.

11. The production of finished burnt brick from January 1, 1916, to March 1, 1924, was as follows:

Month	1916	1917	1918	1919	1920
January	870, 328	1, 730, 833	1, 687, 870	1, 232, 447	1, 315, 661
February	880, 314	1, 565, 935	1, 712, 896	1, 363, 122	1, 332, 921
March	870, 164	2, 029, 880	2, 004, 052	1, 285, 461	1, 491, 489
April	1, 087, 884	2, 113, 687	2, 142, 489	1, 184, 514	1, 740, 328
May	1, 124, 172	2, 430, 905	1, 785, 615	903, 331	1, 663, 348
June	1, 075, 686	2, 277, 252	2, 175, 432	770, 762	1, 622, 770
July	1, 127, 404	2, 093, 273	2, 398, 657	888, 842	1, 402, 037
August	1, 201, 470	2, 234, 184	1, 788, 505	1, 209, 082	1, 616, 638
September	1, 212, 030	2, 084, 227	1, 697, 310	1, 490, 977	1, 452, 404
October	1, 646, 756	2, 560, 379	2, 264, 707	1, 068, 473	1, 738, 963
November	1, 546, 737	2, 325, 271	1, 764, 501	1, 095, 614	1, 846, 657
December	1, 596, 175	2, 601, 332	1, 931, 673	1, 427, 739	1, 606, 575
Total	14, 239, 120	26, 047, 158	23, 353, 707	13, 920, 364	18, 837, 791
Average	1, 186, 593	2, 170, 597	1, 946, 142	1, 160, 030	1, 569, 816

Month	1921	1922	1923	1924
January	1, 044, 800	572, 496	1, 748, 539	1, 860, 535
February	966, 406	870, 872	1, 410, 555	1, 654, 474
March	625, 023	764, 785	1, 553, 212	----------
April	504, 029	855, 841	1, 498, 134	----------
May	693, 699	1, 244, 788	1, 499, 335	----------
June	476, 534	849, 183	1, 502, 031	----------
July	510, 153	1, 051, 942	1, 501, 890	----------
August	617, 798	1, 354, 990	1, 656, 540	----------
September	450, 743	1, 427, 441	1, 687, 470	----------
October	588, 977	1, 437, 763	1, 749, 618	----------
November	343, 331	1, 627, 693	1, 563, 211	----------
December	637, 378	1, 833, 761	1, 626, 694	----------
Total	7, 458, 871	13, 891, 555	18, 997, 229	3, 515, 009
Average	621, 573	1, 157, 629	1, 583, 102	1, 757, 504

Period	Average monthly production	Total production
Jan. 1, 1916, to Mar. 31, 1917	1, 304, 384	19, 565, 768
Apr. 1. 1917, to Dec. 31, 1918	2, 098, 772	44, 074, 216
Jan. 1, 1919, to Mar. 1, 1924	1, 235, 819	76, 620, 819

12. All the war-time additions to plaintiff's plant and equipment were used after the war to a limited extent. The added facilities duplicated the existing equipment and embodied no improvements, except in the case of the power plant. The construction of some of the facilities, particularly the kilns, was not as good since labor was not as efficient. The additional kilns were used for making brick, and thereafter the brick would be permitted to remain in the kilns in storage to save rehauling. The salvage value of the plant equipment is about 5 percent of cost; the buildings and kilns have very little salvage value. After the war the plaintiff made use of about one-half of the houses built during the war.

13. During the month of October 1922 the General Refractories Company, a Pennsylvania corporation, acquired all the stock of the plaintiff, paying $450 per share for the common stock. The General Refractories Company at that time was negotiating a contract to sell the United States Steel Corporation a large proportion of its requirements of silica brick. The steel corporation insisted that General Refractories Company obtain a sufficient supply of ganister rock to insure performance of the contract. Although the General Refractories Company already had plant facilities and equipment, it did not have sufficient ganister, and its ganister was not of good quality. The plaintiff owned what was considered an inexhaustible supply of ganister rock immediately adjoining its plant, 4 miles of similar rock just beyond the Sproul plant of the General Refractories Company, and another property in eastern Pennsylvania on which there was an enormous amount of ganister, easily accessible to the railroad. After the General Refractories Company acquired the plaintiff's plant it operated the said plant in its entirety, but not to 100-percent capacity. The acquisition by the General Refractories Company of the plaintiff's plant obviated the necessity of paying large royalties for ganister and enabled it to obtain the services of two valuable employees, previously employed by the plaintiff.

The plaintiff had enjoyed a contract for a number of years with the Carnegie Steel Company, a subsidiary of the

United States Steel Corporation, and just prior to the sale of its plant to the General Refractories Company it lost this contract, due to the fact that the Carnegie Steel Company's requirements for silica brick were included in the contract between the United States Steel Corporation and the General Refractories Company, referred to above. This loss was a severe blow to the plaintiff as the Carnegie Steel Company was its largest account.

14. The market value of plaintiff's stock during the years 1917 to October 1922 was between $350 and $375 per share. The book value thereof at December 31, 1921, was $247.96 per share. The outstanding preferred stock of the plaintiff was retired, and in August 1923 the General Refractories Company took over all the assets and business of the plaintiff, for which a bill of sale was made out in the amount of $1.00 and the plaintiff was dissolved.

15. The General Refractories Company owned and operated numerous plants. Shortly after its acquisition of the plaintiff's plant and equipment, it transferred a considerable part of its manufacturing activities to the Claysburg plant, and while this plant prior to the close of the year 1924 was at no time operated at its maximum capacity, it was at all times after November 1, 1922, operated at a much higher rate of production than it had been during the time of its ownership by the plaintiff.

16. After the sale the assets of the plaintiff were set upon the books of the General Refractories Company by taking the total cost of acquisition of the capital stock of the plaintiff and adding to that the cost of liabilities which were assumed, and deducting from that sum the value of the current assets, such as cash, book accounts, notes, inventories, prepaid insurance premiums, and other assets of that nature. The remaining sum was then segregated over the physical assets, the ganister lands being first written up to the same per-ton value as the appraised value of the other deposits of the General Refractories Company, and the remaining sum then distributed over the other fixed assets, as nearly as possible apportioned to the values appraised for the other plants.

17. The following detailed schedule shows the cost of fixed assets to the plaintiff; the depreciation and depletion sustained on such assets, and which has been taken as a deduction from its taxable income by the plaintiff for the years prior to the acquisition of its assets by the General Refractories Company; the book entries of such assets at the time of the said acquisition; and the subsequent entries on the books of General Refractories Company recording the assets at increased book figures:

Assets	Cost to Standard Refractories	Entries on standard refractories books at time of acquisition by General Refractories	Entries on General Refractories books
Real estate	$79, 867. 35	$38, 677. 00	$77, 355. 00
Buildings	176, 252. 98	94, 046. 00	188, 093. 00
Dwellings	187, 197. 87	107, 745. 00	215, 489. 00
Mach. & equipment	229, 178. 69	166, 089. 50	332, 179. 00
Power plants	95, 028. 86	33, 190. 00	66, 379. 00
Kilns and yards	259, 271. 83	264, 619. 00	529, 238. 00
Total	1,026,797.58	704, 366. 50	1, 408, 733. 00
Depreciation	351, 303. 18		
	675, 494. 40		
Ganister Lands	48, 454. 68	1, 148, 011. 11	8, 388, 000. 00
Depletion	8, 174. 50		
Total	40, 280. 18		
Coal land	10, 000. 00	30, 000. 00	60, 000. 00
Depletion	3, 080, 47		
Total	6, 919. 53		

18. In entering the figures shown in finding 17 herein upon its books, the General Refractories Company used as a basis an appraisal which had been made a year or two previously for the plaintiff, but did not use the exact appraised figures. The figures entered were arrived at in the following manner: At the time the assets of the plaintiff were acquired by General Refractories Company the latter owned, or contemplated buying, eleven other refractories plants. For the purpose of a bond issue, it had had the physical assets of those eleven plants appraised. Using the appraisal of those eleven plants as a guide, the total cost of the stock of plaintiff (after deducting an allowance for mineral lands) was allocated to the various types of assets acquired from the plaintiff. The allocation was in

the ratio which the value of the same type of assets in the other eleven plants bore to the total value of all the physical assets of the eleven other plants. The assets acquired from plaintiff appeared upon its books at an amount equal to one-half the price paid for its stock by the General Refractories Company. The final closing entries on the books of the plaintiff were identical with the opening entries on the books of the General Refractories Company.

19. On or about March 15, 1919, plaintiff filed a tentative income and profits tax return with the collector of internal revenue for the first district of Pennsylvania for the calendar year 1918, and on July 30, 1919, it filed its completed return for that year. In this latter return plaintiff claimed a deduction of $128,566.22 on account of amortization of war facilities. The return showed a tax liability of $16,013.45, which amount was paid to the collector as follows:

March 17, 1919	$6,000.00
June 16, 1919	6,000.00
September 5, 1919	10.08
December 15, 1919	4,003.37
Total	16,013.45

20. On February 25, 1925, the Commissioner of Internal Revenue notified the plaintiff by letter that he had determined a deficiency in income and profits taxes for 1918 in the amount of $104,516.78. In determining this deficiency the Commissioner disallowed the deduction, claimed in the return, of $128,566.22 as amortization of war facilities. On April 23, 1925, plaintiff appealed to the United States Board of Tax Appeals for a redetermination of the said deficiency. The Board rendered a decision adverse to the plaintiff on February 3, 1927, and on May 25, 1927, entered a judgment on said appeal in favor of the Commissioner of Internal Revenue (6 B. T. A. 24). On his March 1928 list the Commissioner made an assessment against the plaintiff of the deficiency determined by the Board, as aforesaid, in amount of $104,516.78, together with interest thereon of $12,988.72, aggregating $117,505.50, which was paid by the plaintiff to the collector on August 18, 1928.

Opinion of the Court

21. On October 25, 1928, plaintiff filed with the collector of internal revenue for the first district of Pennsylvania a claim for refund of $133,518.95, income and profits taxes paid for the year 1918. This claim was based on the contention that plaintiff was entitled to a deduction from its gross income for the calendar year 1918 of $238,305.79 as and for amortization of war facilities. On December 7, 1928, the Commissioner of Internal Revenue rejected plaintiff's claim for refund.

The court decided that plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover the amount of an additional assessment of income and profits taxes for the year 1918 of $104,516.78, resulting from the disallowance by the Commissioner of Internal Revenue of a deduction claimed by plaintiff in its income tax return for that year for the amortization of war facilities pursuant to section 234 (a) (8) of the Revenue Act of 1918, the relevant portions of which read:

> That in computing the net income of a corporation subject to the tax imposed by Section 230 there shall be allowed as deductions * * *.
>
> (8) In the case of buildings, machinery, equipment, or other facilities, constructed, erected, installed, or acquired, on or after April 6, 1917, for the production of articles contributing to the prosecution of the present war, and in the case of vessels constructed or acquired on or after such date for the transportation of articles or men contributing to the prosecution of the present war, there shall be allowed a reasonable deduction for the amortization of such part of the cost of such facilities or vessels as has been borne by the taxpayer, but not again including any amount otherwise allowed under this title or previous Acts of Congress as a deduction in computing net income. * * *

At the time the foregoing section was incorporated in the Revenue Act of 1918 (passed in February 1919), it was recognized that many taxpayers had made large expenditures for additions to plants and equipment to be used in producing war materials, and that many of these increased

facilities would not be required for post-war production. It was further recognized that existing law for the ordinary wear and tear in the use of the facilities was not so worded as to permit an adequate deduction for the great loss in useful value at the end of the war of facilities thus constructed to meet the abnormal war demands. The Ways and Means Committee of the House of Representatives, in reporting the 1918 Act to the House, stated:

> (4) Due to the necessity for erecting buildings and building machinery for war purposes many buildings and much machinery have been erected that will be of little value after the war. Under existing law it is impossible for the Treasury Department to allow deductions other than for the ordinary exhaustion, wear and tear, and depletion of such property. A provision is incorporated in this bill to allow the Treasury Department in such cases to allow special amounts for amortization, according to the peculiar condition in each case, but such amounts cannot exceed in any year 25 per cent of the net income. At any time within three years the allowance may be re-examined, and if found incorrect the taxes will be readjusted, and any overpayment refunded, or any underpayment collected from the taxpayer.

The conditions precedent to a taxpayer's right to a reasonable amortization deduction are: (1) that he must have constructed, erected, installed, or acquired on or after April 6, 1917, buildings, machinery, equipment, or other facilities; and (2) that such buildings, machinery, equipment, or other facilities must have been constructed, erected, installed, or acquired for the production of articles contributing to the prosecution of the war. These conditions precedent have been fully established. The facts disclose that silica brick manufactured and sold by plaintiff was an article used in the prosecution of the war, and that subsequent to April 6, 1917, plaintiff erected and installed additional plant equipment and facilities to meet the war demand for its product as follows:

Plant and equipment	$354, 781. 12
Tenements	139, 014. 56
	493, 795. 68

The facts further disclose that plaintiff's pre-war facilities were more than adequate to meet the post-war production requirements and that the war time additions to its plant and equipment were used only to a limited extent after the war, the added facilities merely duplicating existing equipment and embodying no improvements except in the case of the power plant.

The courts have laid down the rule that where war time facilities are used in a taxpayer's post-war business the reasonable amortization deduction provided in the law is the difference between the depreciated war time cost of such facilities and their value as determined by their actual post-war use in the business. *Ashland Iron & Mining Co.* v. *United States*, 74 C. Cls. 172; *United States* v. *Briggs Mfg. Co.*, 40 Fed. (2d) 425, (C. C. A. 2), *Diamond Alkali Co.* v. *Heiner*, 60 Fed. (2d) 505. It appears in this case that the average war time production of plaintiff's plant was 2,098,772 bricks per month, and that the average post-war production a month was 1,235,819 bricks, or 58.5 percent of the war time production. On this basis of comparison, which the courts hold to be a reasonable method of computation, the loss of useful value of plaintiff's war time additional plant equipment and facilities was 41.2 percent of their war time depreciated cost, $452,675.70. This percentage is less favorable to plaintiff than the law requires when it is considered that the maximum post-war production for no given month equalled the maximum pre-war production, indicating beyond question that the pre-war plant was sufficient for plaintiff's post-war production. Since the salvage value, outside of the tenement houses, was practically nothing, plaintiff might reasonably be held to be entitled to an amortization allowance in substantially the full amount of the war time costs of the additional equipment and facilities, other than the cost of the tenement houses. However this may be there can be no doubt that plaintiff's loss in the useful value of its additional war equipment and facilities was at least 41.2 percent of their cost, and that it was entitled to an amortization deduction for the year 1918 based on this percentage.

The defendant in its brief does not seriously controvert the correctness of the conclusion just stated but contends

that plaintiff through the sale of its plant and equipment in 1922 more than recaptured its entire war time costs of the additional equipment and facilities and for that reason is not entitled to the amortization deduction provided, and cites in support of its contention *Walcott Lathe Co.*, 2 B. T. A. 1231, *Interlake Iron Corporation*, 25 B. T. A. 637, *Pierce Oil Corporation*, 32 B. T. A. 403, and other cases. These cases lay down the rule that where it is shown that a taxpayer has disposed of particular war time facilities at a price equal to or in excess of their war time cost no need for the application of the amortization provision of the statute exists and an amortization deduction may not be allowed. There can be no question as to the correctness of this rule as it is evident that where a taxpayer has disposed of war time equipment and facilities for more than their cost he suffered no loss from his expenditures in acquiring or constructing them.

The facts in the cases cited by the defendant and the facts of the instant case are clearly distinguishable. In each of the cited cases the taxpayer had sold the particular war time facilities sought to be amortized for an amount equal to or in excess of their cost. In this case plaintiff, the taxpayer, did not sell the particular facilities sought to be amortized. It is true that during the year 1922 the General Refractories Company, also engaged in the manufacture and sale of silica brick, purchased from plaintiff's stockholders all the common and preferred stock of plaintiff and thereby became its sole stockholder, and that in 1923 the General Refractories company, by bill of sale, took over all the assets and business of plaintiff, including the war time facilities, and thereafter dissolved the company. The defendant says that the acquisition of plaintiff's stock by the General Refractories Company in 1922 and its subsequent assumption of the assets of plaintiff in 1923 under the bill of sale, constituted but parts of a single transaction, the purpose of which on the plaintiff's part was to dispose of its plant, and that the effect of the whole transaction was the sale by plaintiff of its assets, including the war time facilities involved, to the General Refractories Company at a price which defendant contends was in excess of their war time costs. We do not agree with the defendant that the individual sales of their

stock by plaintiff's stockholders, under the circumstances stated, can be construed as a sale by plaintiff of either its stock or its assets, but even conceding that such was the case there is nothing in the record on which a finding can be made as to what part of the purchase price of the stock represented the value of plant equipment and facilities as distinguished from the value of other assets of the company, and this is particularly true as to the war time facilities sought to be amortized. The facts show that the General Refractories Company had ample facilities for its then and prospective production demands but that it had an inadequate supply of ganister rock used in the production of silica firebrick. In 1922 it was negotiating a very large contract with the United States Steel Corporation and that company insisted that the General Refractories Company obtain a sufficient supply of ganister rock to insure performance of the contract. Plaintiff had, immediately adjacent to its plant, what seemed to be an almost inexhaustible supply of ganister rock of a superior quality. It is quite clear that the main purpose of the General Refractories Company in acquiring the stock of plaintiff was to obtain control of this immense supply of ganister. It had no immediate need in its business for other assets of plaintiff. No appraisal of the assets is shown to have been made prior to the acquisition of the stock by the General Refractories Company and it is not possible to determine the relative value of plaintiff's various assets, but the record leaves no room for doubt that the price paid to individual shareholders of plaintiff for their stock was paid on account of the valuable ganister rock owned by plaintiff, and not on account of plant facilities. If, therefore, it be held that the purchase of plaintiff's entire stock by the General Refractories Company from the stockholders of plaintiff in the manner stated, and the subsequent taking over of the assets of plaintiff by the General Refractories Company under a bill of sale, constituted a sale by plaintiff of its assets, as the defendant contends, there is no way in which the sales price of the specific facilities sought to be amortized can be determined.

In the absence of an affirmative showing that plaintiff sold its war time facilities and recaptured in whole or in

part their costs, it is entitled to the reasonable amortization deduction provided by the statute. The cost of the war time equipment and facilities involved, less depreciation sustained and allowed to December 31, 1918, was $452,675.70. In its income tax return for that year it claimed and took a deduction from income of $128,566.22 on account of amortization of war facilities, which was considerably less than the amortization deduction plaintiff was entitled to on the basis of comparison of the war and post-war production of the plant. The Commissioner disallowed the deduction of $128,566.22 in its entirety and made an additional assessment against plaintiff of $104,516.78, which additional assessment, together with interest thereon, aggregating $117,505.50 was paid by plaintiff on August 18, 1928. The additional assessment was based entirely on the Commissioner's wrongful disallowance of the amortization deduction claimed by plaintiff in its tax return and was thus erroneously and illegally made. Plaintiff having filed timely claim for refund in respect to the additional assessment is entitled to recover and is hereby awarded judgment for $117,505.50, with interest as provided by law.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO AND RONALD L. TREE, AS SURVIVING TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF LAMBERT TREE, DECEASED, v. THE UNITED STATES

[No. M–399. Decided February 8, 1937]

On the Proofs

Income tax; deduction of cost of buildings demolished under terms of lease; amortization of cost over term of lease.—The undepreciated cost to the taxpayer of old buildings demolished by a lessee pursuant to a long-time lease under which the lessee was to erect modern structures in their stead was not deducti-

ble from income as loss wholly sustained at the time the buildings were demolished, but was deductible on the basis of amortization of such cost over the entire term of the lease.

Deduction from trust income of portion set aside to charitable institution.—Where under the terms of a will one-half of a trust estate created thereunder was, upon the termination of the trust, to go to a specified charitable institution; and, pursuant to the will, the sum of $44,219.10 of the trust income for 1925 was set aside and credited to a fund for building and protection of the trust estate against impairment, and one-half of this sum permanently set aside for such charitable institution, the trust was entitled, in the computation of its taxable net income, to a deduction of the amount so set aside for said institution.

Offset by Government in suit for refund; burden of proof.—Where, in a suit for refund of income tax, the Government sets up as an offset an item of additional tax based upon a contention of error by the Commissioner of Internal Revenue in the computation of the tax, it has the burden of sustaining its contention by the preponderance of the evidence.

The Reporter's statement of the case:

Mr. Allen H. Gardner for the plaintiffs. *Morris, Kix-Miller & Baar* were on the briefs.

Mr. J. H. Sheppard, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiffs are the surviving trustees of a trust created under the last will and testament of one Lambert Tree. Changes have occurred from time to time among the trustees of the said trust since its creation, but, unless otherwise indicated, the name "plaintiffs" will be used herein indiscriminately as referring to the trustees now in office or their predecessors.

2. Lambert Tree, a resident of Chicago, Illinois, died October 9, 1910. By his will, duly probated, he gave, devised, and bequeathed substantially all the residue of his estate remaining after the payment of debts, administration expenses, and specified bequests, subject to the payment of certain annuities, to designated trustees and their successors, in trust. The trustees were given power to manage and control the trust property, according to their best judgment and

discretion, and to pay out of the income therefrom, under certain conditions which were operative during the year 1925, after reserving a specified part of the income as an improvement fund, a suitable allowance for the support, maintenance, and education of the testator's grandson, Ronald L. Tree, until he should reach the age of thirty years. The trustees were further directed by the will to retain and invest the residue of the net income and to pay the amount of such accumulation over to Ronald L. Tree when he should become thirty years of age, which age he had not attained during the year 1925.

3. March 15, 1926, plaintiffs filed an income-tax return for the trust for 1925, disclosing a tax due of $8,668.98, which was paid as follows:

March 15, 1926	$2,167.25
June 14, 1926	2,167.25
September 15, 1926	2,167.24
December 15, 1926	2,167.24

Thereafter the Commissioner timely assessed an additional tax for 1925 of $3,622.28, which, together with interest in the amount of $781.17, was paid November 6, 1929.

4. Subsequently plaintiffs filed three claims for the refund of income tax and interest theretofore paid for the year 1925. The first of these, filed August 31, 1927, requested the refund of $8,021.40 on the ground, among others, that the trust sustained a loss upon the demolition in 1925 of certain buildings and equipment under lease, and that the amount thereof should be allowed as a deduction in computing the trust net income for that year. The second claim, filed December 13, 1929, similarly sought a refund of $11,410.40 on the ground that the trust was entitled to deduct, in the computation of net income, the amount of the loss sustained upon the demolition and obsolescence of the aforesaid buildings. The third claim, filed October 8, 1932, sought the refund of $4,300 on the ground that there should be allowed as a deduction in computing the trust net income, an amount of $22,109.55, which it was alleged the trust, pursuant to the instrument of its creation, had permanently set aside during 1925 out of its gross income for the benefit of St. Luke's Hospital of Chicago, Illinois, a charitable corpora-

tion. The first and second claims were rejected by the Commissioner of Internal Revenue November 6, 1929, and April 27, 1930, respectively. The third claim has not been finally acted upon by the Commissioner.

5. At the time of his death in 1910 Lambert Tree owned in fee among other properties, four pieces of real estate located at the intersection of North LaSalle and Randolph Streets, Chicago, Illinois. These four parcels, together with a fifth acquired in fee by the trustees within about a year after Tree's death, comprised a rectangle of adjoining properties with a frontage on North LaSalle Street of approximately 181 feet and on Randolph Street of nearly 131 feet, an area of approximately 23,700 square feet. These five properties were each improved by buildings which had been constructed many years prior to 1923, about the first or second decade immediately after the Chicago fire of 1871.

By 1923 the buildings referred to above were not modern in appearance, architecture, or accommodations and equipment provided therein. The buildings varied in height from two to seven stories. They were used for various purposes, including stores, offices, restaurant, and other similar uses. Toilet facilities were generally poor and in many instances inadequate and the elevator and heating equipment were of a similar character. The same was also generally true as to the decorations, arrangement, and accommodations provided in the stores, offices, etc.

6. At the time the lease, hereinafter referred to, was executed in 1923 the buildings were fairly well filled with tenants. Most of the tenants held leases on a year-to-year basis, though some of the stores had leases thereon running 2, 3, 4, and 5 years and in one instance a tenant had a ten-year lease with a cancellation clause at the end of the sixth, seventh, eighth, or ninth year. The rentals being obtained at that time were about the same as those being obtained for similar property in the same locality, but the rentals were only from one-third to one-half the rate being received in that area in modern buildings. The land on which the buildings were located had a value in 1923 of approximately $1,500,000.

The net rental income received by plaintiffs from the properties during the period 1918 to 1922, inclusive, without any deduction for depreciation on the improvements was as follows:

1918	$28, 192. 95
1919	32, 496. 20
1920	30, 562. 84
1921	31, 006. 49
1922	29, 122. 85

7. In and for some four or five years prior to 1923 there was a tendency on the part of owners of real estate in the locality where the Tree buildings were located to replace older buildings with the modern fireproof skyscraper type of buildings, and during that period plaintiffs had considered the possibility of a similar change with respect to the Tree real estate involved in this proceeding.

8. For some years prior to 1923, two brothers, Emil and Karl Eitel, had been acquiring property in the block in which the Tree real estate here in controversy was located and by 1923 owned a substantial part of that block. From time to time prior to 1922 the Eitel brothers negotiated with plaintiffs for the purchase of the Tree properties in order to round out their holdings and provide a site for a large modern building. No progress was made in these negotiations until 1922 when negotiations began which culminated in the execution of a lease on the properties.

The terms of the will of Lambert Tree prohibited the sale of the fee to the property and the negotiations were accordingly directed to an agreement on a long-term lease which would accomplish the purposes desired. During the negotiations considerable discussion took place as to the rental to be charged in the earlier years of the lease, the Eitel brothers urging that the rental should be low in those years because of existing leases on the buildings which might delay the erection of the new buildings.

On May 1, 1923, the lease was executed between plaintiffs and Karl and Emil Eitel. The lease was effective immediately upon its execution and ran for a period of 198 years. The rentals specified by the lease were as follows: $36,000

per year for the first four years; $50,000 per year for the next two years; $70,000 per year for the next seven years; $85,000 per year for the next seven years; $100,000 per year for the next seven years, and $110,000 per year for the remainder of the term of the lease. By the terms of the lease the lessees were required to erect and complete before May 1, 1943, a modern fireproof structure of not less than twelve stories in height, suitable for mercantile, hotel, or office purposes, and covering substantially the whole area leased; to pay all taxes and assessments, general and special, on the premises with the exception of income, inheritance, estate, and transfer taxes; and upon the termination of the lease to deliver up the premises to the lessors without compensation, with all improvements thereon.

9. Immediately upon the execution of the lease the Eitel brothers proceeded to make arrangements for the erection of the new structure provided by the lease. Before such structure could be begun it was, of course, necessary to remove the old buildings and before such removal could be undertaken it was necessary to acquire, or arrange for the cancellation of, the leases of the various tenants in the old buildings. (See finding 6.) In the beginning little difficulty was experienced in settling with the tenants but later considerable difficulty was encountered with the result that the lessees were required to pay between $60,000 and $80,000 to effect cancellations of the various leases. During the period from the execution of the lease with plaintiffs and until the leases on the old buildings were cancelled or otherwise disposed of, the Eitel brothers received the rentals from the old leases and in some instances made new leases from which they likewise received rentals, but in all cases such new leases contained a thirty-day cancellation clause. The operations during the aforementioned period were not profitable.

In November 1924 a contract was let for the demolition of the old buildings and the demolition was begun and completed in the early part of 1925, Eitel brothers paying therefor between $19,000 and $20,000 and the contractor being allowed to retain the material from the old buildings. The

construction of the new building was begun immediately after demolition of the old buildings and it was completed in 1926.

10. At the time of demolition the old buildings and improvements connected therewith had a depreciated value for income-tax purposes, based on their value on March 1, 1913, or cost if acquired subsequent to that date, less depreciation sustained since March 1, 1913, or date of acquisition if acquired subsequent to that date, of $58,626.34. In determining the net income of the trust for 1925 the Commissioner prorated the aforementioned value of the buildings and improvements over the life of the lease, 198 years, and allowed to the plaintiffs, as a deduction for that year, $148.05, which represented one-half of the annual amortized value on that basis.

11. The will of Lambert Tree provided, *inter alia*, that upon the termination of the trust one-half of the trust estate then remaining in the hands of his trustees should go to the lawful issue of his son Arthur, *per stirpes*; that, in the event no lawful issue should then survive, said one-half should go to his heirs at law; and that the other one-half of the trust estate should go to St. Luke's Hospital of Chicago, Illinois, to establish, endow, maintain, and support an addition thereto to be used, so far as required for that purpose, in aid of cripples and persons afflicted with rupture. The will also provided that the trustees should reserve and set aside 10 percent of the net annual income of the trust estate in their hands up to $60,000, and 20 percent of the excess of the net annual income above $60,000 as a "building fund and as a protection against the impairment of said trust estate by accidents or other contingencies." Pursuant to this latter provision the trustees on December 31, 1925, caused to be set aside and credited to the specified fund out of the net income for 1925 an amount of $44,219.10.

12. One-half of the amount of $44,219.10 thus set aside, that is, $22,109.55, was permanently set aside during the year 1925, pursuant to the terms of the will, for the use of St. Luke's Hospital. The parties have stipulated that the said hospital comes within that class of organizations desig-

nated in section 214 (a) (10) of the Revenue Act of 1926 as a "corporation, or trust, or community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual." The Commissioner in his final determination of the trust net income, allowed as a deduction only $6,562.62 of the amount thus set aside. The defendant now concedes that the full amount of $22,109.55 was set aside for St. Luke's Hospital and that it should be allowed as a deduction from trust income for 1925.

13. The final determination of the Commissioner prior to the institution of this suit and that which gave rise to the additional assessment of $3,622.28 (see finding 3) was arrived at in the following manner:

1925

Total net income retained by trustees, adjusted		$93, 023. 03
Less:		
Nontaxable interest		5, 852. 27
Taxable income		87, 170. 76
Less:		
Dividends	$19, 767. 43	
Personal exemption	1, 500. 00	
		21, 267. 43
Income subject to normal tax		65, 903. 33
Normal tax at 1½% on $4,000.00		60. 00
Normal tax at 3% on $4,000.00		120. 00
Normal tax at 5% on $57,903.33		2, 895. 17
Surtax on $87,170.76		9, 222. 44
Tax at 12½% on $129.07		16. 13
Total tax		12, 313. 74
Less:		
Tax paid at source		22. 48
Tax assessable		12, 291. 26
Tax previously assessed		8, 668. 98
Deficiency in tax		3, 622. 28

The above taxable income was arrived at by first computing the total income of the trust, and in that computation the entire amount of depreciation sustained on the depreciable property of the trust, namely, $31,093.85, was allowed as a deduction.

The court decided that plaintiffs were entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

The plaintiffs bring this suit for the recovery of alleged overpayments of income taxes for the year 1925.

For many years prior to 1923, the plaintiffs were the owners of a tract of land in the business district of Chicago which had buildings thereon. These buildings had been constructed many years prior thereto and were not modern in character. They were rented at that time and an income of approximately $30,000 a year was being derived therefrom. This income was materially less than that which was being received by owners of modern buildings on comparable property and represented a small return on plaintiffs' capital, when considered in relation to the value of the buildings and the land. These properties being situated in the very heart of the business district of Chicago, the land value had gradually appreciated and the buildings' value had slowly depreciated.

In 1923 the plaintiffs executed a lease for 198 years under the terms of which the lessees undertook to erect a modern fireproof structure on the premises within a definite limit of time from the date of the lease. It was provided that, upon the termination of the lease, the building erected thereon was to become the property of the plaintiffs without additional cost. Upon the execution of the existing lease and after the old structures had been vacated, the lessees caused the old buildings to be demolished in 1925 and immediately thereafter began the construction of a new building. It is stipulated the undepreciated cost to plaintiffs of the old buildings was $58,626.34 at the time of demolition. The plaintiffs contend that a loss in that amount was sustained by them when the buildings were destroyed in 1925 and that such loss is deductible in that year under

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the provision of Section 214 (a) (4) (5) of the Revenue Act of 1926 which provides for the deduction of "losses sustained during the taxable year and not compensated for by insurance or otherwise * * *."

The Commissioner of Internal Revenue in reviewing plaintiffs' refund claim treated the undepreciated cost of such buildings as allocable to the cost of the lease and accordingly allowed plaintiffs a deduction for 1925 on the basis that such cost should be amortized over the entire period of the lease.

The question presented here is not a new one. Over a decade ago, the United States Board of Tax Appeals in the case of *Charles N. Manning et al.*, 7 B. T. A. 286, laid down the principle of treating the undepreciated value of buildings which are destroyed incident to the erection of new buildings under a lease, as a part of the cost of the lease and amortizing such value or cost for the purpose of deduction in a taxable year over the life of the lease. This ruling has been followed consistently by the Board since that time. This same question has been considered on many occasions by the circuit courts of appeal, and in the leading case of *Anahma Realty Corporation* v. *Commissioner*, 42 Fed. (2d) 128, certiorari denied 282 U. S. 854, it was said:

> Under the provisions of the lease, appellant's lessee, at its own expense, was obliged to replace the buildings demolished with a new office building which became the property of the appellant at the end of the term. While section 234 (a) of the Revenue Act of 1918 permits the deduction of losses sustained during the taxable years, the appellant did not sustain a loss. *Pelican Bay Lumber Co.* v. *Blair* (C. C. A. 1929) 31 F. (2d) 15. The removal of the buildings was a part of the cost of acquiring the lease, and with it came the obligation of the tenant to pay the rent. The cost of acquiring an asset cannot be regarded as deductible as a loss or business expense for the year in which it is paid or incurred. Moreover, section 215 (b) of the Revenue Act of 1918 provides that there may be no deduction for any amount paid out for new buildings or for permanent improvements or betterments to increase the value of any property or estate, and, as the asset acquired was a long-term lease, which provided an obligation to pay stipulated rentals and erect a new building in place of the

> building demolished, there may be no deduction allowed. There was necessarily contained in the lease permission on the part of the appellant to permit the lessee to destroy the old buildings. The acquisition of something from which income will be derived in the future has a value in money's worth in the same sense as something which will produce income in praesenti; there was a compensating value for the loss of the buildings which must be recognized as having money's worth. *There was a substitution of assets rather than a loss sustained in the destruction of the buildings.* [Italics ours.]

See also *Young* v. *Commissioner*, 59 Fed. (2d) 691, certiorari denied, Nov. 7, 1932, 287 U. S. 652; *Spinks Realty Company* v. *Burnett*, 62 Fed. (2d) 860, certiorari denied, Oct. 9, 1933, 290 U. S. 636; *Smith Real Estate Company* v. *Page*, 60 Fed. (2d) 592, affirmed 67 Fed. (2d) 462.

The plaintiffs recognize the force of these decisions but insist that the instant case can be distinguished on the ground that at the time of the execution of the lease in 1923, the buildings in question were "devoid of economic value" both to the lessor and the lessees and that therefore it can not be said that anything of value was given by the lessees for a lease in the form of the value of these buildings. We can find no merit in this contention. The situation of these plaintiffs is essentially the same as that presented in most, if not all, of the cases referred to. At the time of the making of the lease, the plaintiffs were receiving approximately $30,000 a year and also had to pay taxes and insurance. Immediately upon the execution of the lease they received $36,000 a year free of taxes and insurance payments. It is obvious that from the very minute of the execution of the lease the plaintiffs did receive an increase of rental values which was in the nature of a compensation for the property destroyed. The object of the plaintiffs in entering into this lease for a long term of years was the desire to substitute an asset of greater value for an asset of lesser value and that is precisely what they obtained. The action of the Commissioner in respect to this deduction was proper and in line with the principle laid down by the Board of Tax Appeals and the Courts.

Another question arises in the case by reason of the provisions in the will of Lambert Tree which created a trust and the fact that, upon termination of the trust provided in the will, one-half of the trust estate was to go to St. Luke's Hospital, an organization which the parties have stipulated qualifies as a charitable organization within the meaning of Section 214 (a) (10) of the revenue act of 1926.

When the Commissioner of Internal Revenue originally determined the plaintiffs' tax liability for the year 1925, he made an error in allowing a deduction of only $6,562.62 on the interest of the St. Luke's Hospital in the fund of $44,-219.10, set up pursuant to the terms of the will of the testator as a building fund and as a protection against the impairment of the corpus of the trust estate. As the will provided that one-half of the trust corpus was to be distributed to St. Luke's Hospital at the termination of the trust, the sum of $22,109.55, set aside to preserve that property, was properly deductible as a gift to an organization operated exclusively for religious, charitable, scientific, literary, or educational purposes. The defendant agrees that this amount is correct but sets up as an offset that the Commissioner made another error in his computation which allowed a deduction of the entire amount of depreciation sustained on the trust property in the sum of $31,093.85, whereas he should have allowed only that part of the depreciation which was allocable to the income retained by them and sustained on trust property other than that held for St. Luke's Hospital.

We do not feel that it is necessary to enter into a discussion of this offset as presented by the defendant. The section allowing the charitable deduction, section 219 (b) (1) of the Revenue Act of 1926, provides that the deduction shall be allowed "without limitation." If an adjustment is to be made which affects that allowance, it must be clearly shown that it does not do violence to that section which allows the deduction without limitation. Suffice it to say the Commissioner never made any determination on this point and it was first made in the trial of the case. The evidence produced is not sufficient to bear the burden which

Syllabus

the defendant has of sustaining its contention by the preponderance of the evidence.

Judgment will accordingly be entered for the plaintiffs, with entry of judgment suspended pending the submission of computations by the parties in accordance with this opinion. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

AMERICAN SANITARY RAG COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 42680. Decided February 8, 1937]

On the Proofs

Contract for Government supplies; breach by contractor; liability for loss resulting from breach.—Where in a contract for furnishing certain supplies for the Navy Department the contractor objected to rejections by the Government of certain shipments of such supplies for failure to meet the contract requirements, but failed to appeal from such rejections as provided for by the contract, and refused further performance, his action constituted a breach of the contract and rendered him liable to the Government therefor.

Set-off; recoupment of Government loss against plaintiff's claim.—Where the Government withheld from the contract price due the plaintiff for performance of a contract a balance thereof equal to and in compensation for loss sustained by it through the plaintiff's default in performance of a prior contract, the Government is entitled to recoup such loss by way of set-off in a suit by plaintiff for such balance of contract price withheld by the Government.

Pleading and practice; strict rules of common law not applied; counterclaim.—The forms of pleading in the Court of Claims are not of so strict a character as to preclude recovery of whatever is claimed and is justly due either party upon the facts shown; and where all the facts and questions are before the court, a set-off or counterclaim may be allowed by way of recoupment without any formal pleading thereof against a plaintiff who establishes his right to recover on his claim against the Government.

Reporter's Statement of the Case

Same; competency of evidence.—The filing of a counterclaim is the proper practice for recoupment by the Government against the plaintiff's claim in a suit where the claims of the parties grew out of different transactions; but where the Government's claim against the plaintiff was fully disclosed by the plaintiff's petition, the court will take cognizance of it without the filing of a counterclaim, and evidence was properly admitted in support of it by the commissioner of the court.

The Reporter's statement of the case:

Mr. Max Tendler for the plaintiff. *Messrs. Julius I. Peyser, Aaron W. Jacobson,* and *Myron M. Cohen* were on the briefs.

Mr. Sam W. Wassell, with whom was *Mr. Assistant Attorney General James W. Morris,* for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation, organized and existing under the laws of the State of Illinois, with its main office and principal place of business in the City of Chicago, Illinois. It has been and now is engaged in the business of processing, washing, and selling rags, dealing in and selling wipers and cleaning cloths.

2. On June 21, 1930, plaintiff entered into contract No. 17886 with the Bureau of Supplies and Accounts, U. S. Navy Department, for the delivery of 1,030,000 pounds of cotton rags, known as "wipers", for the sum of $63,424.

3. On August 10, 1933, plaintiff entered into contract No. 32694 with the Bureau of Supplies and Accounts, U. S. Navy Department, for the delivery of approximately 150,000 pounds of cotton wiping cloths, for the sum of $10,125.

4. Plaintiff performed its part under contract No. 32694. Defendant paid plaintiff the amount set forth in the contract, except the sum of $2,157.35, in which sum defendant claims it was damaged by the failure of plaintiff to complete its contract No. 17886. Said sum represents the excess cost to defendant for completing the contract after inviting and receiving bids for its completion.

5. Contract No. 17886 contained the following provisions:

ARTICLE 4. *Inspection.*—(a) All material and workmanship shall be subject to inspection and test at all

times and places and, when practicable, during manufacture. The Government shall have the right to reject articles which contain defective material or workmanship. Rejected articles shall be removed by and at the expense of the contractor promptly after notification of rejection.

ARTICLE 5. *Delays—Damages.*—If the contractor refuses or fails to make deliveries of the materials or supplies within the time specified in Article 1, or any extension thereof, the Government may terminate the right of the contractor to proceed with deliveries or such part or parts thereof as to which there has been delay. In such event, the Government may purchase similar materials or supplies in the open market or secure the manufacture and delivery of the materials and supplies by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby: *Provided*, That the contractor shall not be charged with any excess cost occasioned the Government by the purchase of materials or supplies in the open market or under other contracts when the delay of the contractor in making deliveries is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, but not including delays caused by subcontractors: *Provided further*, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and extent of delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal within thirty days by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

ARTICLE 7. *Increase or decrease.*—Unless otherwise specified, any variation in the quantities herein called for, not exceeding 10 percent, will be accepted as a compliance with the contract, when caused by conditions of loading, shipping, packing, or allowances in manufacturing processes, and payments shall be adjusted accordingly.

ARTICLE 12. *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning

Reporter's Statement of the Case

questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties hereto as to such questions of fact. In the meantime the contractor shall diligently proceed with performance.

6. Contract No. 17886 provided for the delivery by plaintiff of the following quantities and classes of rags at five specified points of delivery:

Class No.	Quantity	Point of delivery
1270	300,000 pounds N. S. D	Brooklyn, New York.
1272	100,000 pounds N. S. D	Hampton Roads, Virginia.
1273	30,000 pounds N. Y	Charleston, S. C.
1274	200,000 pounds N. S. D	San Diego, California.
1275	400,000 pounds N. Y	Mare Island, California.

On October 28, 1930, defendant, contending that plaintiff had failed to complete its contract No. 17886, invited bids for the completion of classes Nos. 1270, 1272, 1274, and 1275. (Class No. 1273 had been satisfied by plaintiff within the provisions of Article 7 of said contract.) Plaintiff submitted the lowest bid, but it was not considered. The awards were then made to the next lowest bidders for each class.

7. The excess cost to defendant for the completion of contract No. 17886 was $2,157.35, as disclosed by the following statement:

Statement of contract quantities, quantities delivered, amounts paid, and undelivered quantities

[Contract No. 17886]

Class	Contract quantity (about)	Quantities delivered	Amounts paid	Undelivered quantities
1270	300, 000	132, 510	$10, 493. 94	167, 490
1272	100, 000	48, 501	3, 268. 82	51, 499
1274	200, 000	149, 843	4, 188. 37	83, 111
1275	400, 000	121, 054	14, 632. 50	245, 992
	1, 000, 000	451, 908	32, 583. 63	548, 092

Reporter's Statement of the Case

Statement of purchases for account

Class	Quantity purchased	Price paid	Excess cost charged to contractor
1270	167,588	$11,315.21	$821.27
1272	51,231	3,413.37	144.55
1274	87,939	4,472.93	284.56
1275	246,115	15,525.03	892.53
Transportation			14.44
			2,157.35

8. Contract No. 17886 included as part thereof certain specifications which appear of record as plaintiff's Exhibit B-1, and are by reference made a part hereof.

Paragraph 6 (a) thereof reads as follows:

> Inspection shall be conducted during the process of sorting, sterilizing, and packing, when practicable. When this is impracticable and inspection is conducted after the rags are baled, at least 5 per cent of the bales shall be opened and inspected to determine compliance with the requirements of paragraphs 3 and 5 preceding.

Inspections by Inspector Dwyer and Lieutenant Millon were made of several bales from the tenders by plaintiff of car load lots.

Paragraph 5 (g) of said specifications reads as follows:

> The rags under these specifications shall be washed and sterilized in the United States, as follows: Wash for not less than 15 minutes in heavy suds containing approximately one-half of 1 per cent of calcium hypochlorite, at a temperature of 212° F. or over. Rinse in hot and cold water until no trace of alkali remains in the rinsing water. Extract and dry. Suitable thermometers shall be provided to determine temperature.

These rags were given a "break" in luke warm water; soap and soda were then added; hot water of a temperature of about 240° F. was then turned into the washer, and allowed to run for 25 minutes; fresh hot water was inserted into the washer after the dirty water was emptied; more caustic soda was added, together with more soap, and the rags were given another washing for 3 or 4 minutes; the

water was again emptied; the rags were then rinsed by letting water in and out 3 or 4 times, the last rinsing being with cold water in order to permit the men to handle the rags. This process took about 35 to 40 minutes. After the rags were washed, they were taken to the extracting machine where the water was extracted by centrifugal force during a period of 15 to 18 minutes. The rags were then taken to drying tumblers containing a temperature of approximately 270° F., in which the rags were dried, which process took approximately 30 minutes.

9. The shipment of rags which was submitted for inspection on July 7, 1930, was rejected on account of being overweight. No appeal was taken from this rejection. On August 4, 1930, plaintiff offered to sell the rags so rejected for being overweight at a 5 per cent reduction, which offer was accepted by defendant.

Between July 26, 1930, and September 25, 1930, plaintiff delivered to defendant 479,281 pounds of material called for by contract No. 17886.

On July 31, 1930, another shipment was submitted by plaintiff for inspection. These rags were found by Inspector Dwyer to be dirty, dark, and otherwise not up to specifications. Lieutenant Millon, an assistant inspector of naval materials in Chicago, under whose direction Mr. Dwyer was working, also inspected the rags and rejected them as being dirty, and otherwise not up to specifications. Plaintiff was dissatisfied with this inspection. He marked four bales which had been inspected, and sent them, together with four other bales, to the Bureau of Engineering, Washington, D. C., for re-inspection, as an appeal from the rejection of Inspector Dwyer and Lieutenant Millon. The Bureau of Engineering rejected same, from which action plaintiff did not appeal.

10. On September 26, 1930, plaintiff sent the following telegram to the Bureau of Engineering:

> We mailed samples of rags to E. T. Pickard, Department of Commerce, Chairman Federal Specification Board, and asked him for his opinion as to whether or

not these rags comply with Navy Specifications and he wired us that he will not form his opinion unless he is authorized officially stop Kindly cooperate with us as it will be essential in the future.

On September 26, 1930, the Department of Commerce telegraphed the contractor as follows:

Regret have no authority or facilities for forming opinion whether or not samples comply with specifications.

11. On or about September 27, 1930, plaintiff submitted for inspection another shipment of rags under contract No. 17886. These rags were rejected by the Chicago inspector as being dirty, of inferior grade, and not up to specifications. This verbal rejection was, by letter under date of September 27, 1930, confirmed by Lieutenant Commander Richard P. Hinrich, Inspector of Naval Materials at Chicago, "on account of excessive amount of greasy, dirty, and inferior grade of rags." Plaintiff was dissatisfied and called in four other rag dealers to inspect the rags.

On October 1, 1930, plaintiff wrote a letter to the Bureau of Engineering, Washington, D. C., which contained the following paragraph:

We have tried our best to satisfy; we cannot do better. If you should wish us to continue on this contract we can do so only on the following basis. First: We do not want Lieutenant Millon's inspection. Second: We can now only furnish rags of the quality accepted on order dated March 29, 1930, No. NO–16846. Otherwise we must request cancellation of contract 17886 without reservation.

On October 7, 1930, plaintiff wrote the Bureau of Supplies and Accounts, Navy Department, Washington, D. C., a letter, which contained the following paragraph:

We have tendered specification rags and they have been refused, therefore we cannot continue to manufacture and give you any further rags; and under the circumstances we believe we are in our legal rights to ask for the cancellation of this contract without reservation.

On October 28, 1930, the Bureau of Supplies and Accounts, Navy Department, wrote plaintiff the following letter:

> In view of your statement in the above reference that you will not make any further deliveries under the subject contract, bids are being invited for the following quantities remaining due, as a charge to your account:
>
> | Class: | *Quantity* |
> |---|---|
> | 1270 | 167, 490 lbs. |
> | 1272 | 51, 499 lbs. |
> | 1274 | 83, 111 lbs. |
> | 1275 | 245, 992 lbs. |
>
> These bids will open on 7 November 1930 and unless documentary evidence of shipment is received prior to that date, purchase will be made for your account and no further deliveries accepted under the items in question.

Plaintiff took no appeal from the rejection of the inspector at Chicago, and none of said rags were submitted to the Navy Department at Washington for its inspection.

12. Between September 29 and October 30, 1930, both inclusive, defendant paid plaintiff $10,615.51, under contract no. 17886.

On October 28, 1930, defendant invited bids. Said bids, awarding of contracts thereunder, and the resulting excess cost charged to plaintiff, fully appear in Findings 6 and 7 *supra*.

13. On or about November 1, 1930, plaintiff requested permission to fill contract no. 17886 by shipment of rags from Brooklyn, New York. An inspector of the Bureau of Supplies and Accounts inspected the material submitted at Brooklyn, and rejected same as being of inferior material, and not up to specifications.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

On August 10, 1933, the plaintiff and the defendant entered into a contract, No. 32694, whereby the plaintiff was to deliver to the defendant 150,000 pounds of cotton wiping rags for the sum of $10,125.

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Within the time specified plaintiff delivered all the rags called for in the contract and upon delivery they were inspected and accepted by the defendant as coming within the contract requirements. In settlement with the plaintiff upon completion of the contract the defendant deducted and withheld the sum of $2,157.35, which amount the defendant claimed was then due from the plaintiff because of its alleged default in the performance of a former contract between plaintiff and the defendant, which contract was also for the delivery of cotton wiping rags. The plaintiff brings this suit for the recovery of the amount so withheld by defendant in settlement of contract no. 32694.

Plaintiff in the petition avers the making of contract no. 32694, its complete performance on the part of the plaintiff, and the deduction and withholding by defendant of $2,157.35 of the amount due plaintiff under the contract, which it is alleged was wrongfully done. The petition then sets out the making of the former contract, a copy of which is attached. In paragraph 6 of the petition it is averred that prior to a certain date plaintiff had delivered to defendant a large part of the rags called for in the former contract, and was prepared to complete the contract, but that on September 27, 1930, plaintiff tendered a car load of rags on the contract in accordance with the specifications thereof as to quality and condition, which rags were wrongfully rejected as not specification rags, the defendant wrongfully declaring them to contain an excessive amount of greasy, dirty, and inferior grade rags.

In paragraph 7 of the petition it is averred that on September 27, October 1, and October 7, 1930, plaintiff notified defendant in writing of the impossibility of submitting any other rags under the terms of the contract, and that it would deliver no further rags thereunder. It is then averred in paragraph 8 of the petition that plaintiff has been paid for all rags delivered under the former contract, and has delivered all the rags called for under the contract in suit and has been paid for the same, except for the amount set forth as being wrongfully deducted by the defendant.

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The defendant filed a general traverse to the petition. Proper practice under the rules of the court required the defendant to file a counterclaim [1] for the amount deducted and withheld in settlement of contract no. 32694, since that amount arose out of a transaction other than that sued upon. The defendant, however, did not do this, but filed a general traverse instead. Upon the trial of the case before a commissioner of the court, the defendant over plaintiff's objections submitted evidence which clearly established the fact that the plaintiff had defaulted in the performance of the former contract and that the defendant had sustained damages in the amount of $2,157.35 because of such default. The plaintiff contends that because of the failure of the defendant to file a counterclaim as required by the rules of the court, the commissioner erroneously included this testimony in the record of the case and urges that it be excluded by the court in making its findings of fact upon which the rights of the parties are to be adjudicated.

The Supreme Court has repeatedly held that the forms of pleading in this court are not of so strict a character as to preclude a claimant from receiving what is justly due him upon the facts shown, although the facts may not have been precisely pleaded. *United States* v. *Burns*, 12 Wall. 245, 254; *Clark* v. *United States*, 95 U. S. 539, 546; *United States* v. *Behan*, 110 U. S. 338, 347; *United States* v. *Carr*, 132 U. S. 644, 655. The same rule has likewise been held applicable to the defendant and where the whole question is before the court a set-off or counterclaim, without any formal pleading therefor, may be allowed by way of

[1] Rules of the Court of Claims of the United States, effective March 10, 1936:

"21. If the defendant desires to plead any counterclaim, set-off, claim of damages, or other demand authorized by section 145 of the Judicial Code (U. S. Code, title 28, sec. 250), such pleas shall be filed by the Attorney General within 40 days after the filing of the petition, unless the court, for cause shown, shall extend the time. The defendant may without special plea ask for a reduction or extinguishment of the plaintiff's demand by any matter arising out of the same transaction as that sued upon. Any matter by which the defendant asks for an affirmative judgment against the plaintiff shall be stated in a printed counterclaim with the same particularity with which the plaintiff is required to state his cause of action in the petition.

"22. Within 40 days after the filing of a set-off or counterclaim by the defendant the plaintiff or his attorney shall answer the same by replication under oath, unless the court extends the time."

recoupment against any claimant who establishes his right to recover on a claim against the government, and where the petition discloses the whole of the defendant's case the court will consider and dispose of the case as if a counterclaim had been filed. *Florida Central & Peninsula R. R. Co.* v. *United States*, 43 C. Cls. 572.

The requirement that set-off and counterclaim be especially pleaded is based on the idea that otherwise a plaintiff is not advised of the defense, the general issue plea not being broad enough to put him on notice of such defense. This salutary requirement, however, has been obviated in the present case by the fact that the defendant's claim in respect to the deduction sought to be recovered is fully disclosed in the plaintiff's petition. If a formal counterclaim had been filed by the defendant it would not have made the issues of the case more definite than they were already made in plaintiff's petition which clearly and fully sets forth the defendant's position.

The action being one to recover a balance due, alleged to have been unlawfully withheld, and plaintiff's petition having fully stated the grounds upon which the defendant deducted and withheld such balance, it must be held that the petition and general traverse bring the whole question before the court. While the better practice would have been for the Government to file a formal pleading setting up a counterclaim, *Florida Central & Peninsula R. R. Co.* v. *United States*, *supra*, its failure to do so can not preclude it from receiving what is justly due it by way of recoupment against the plaintiff's claim, the whole case having been brought before the court by plaintiff's petition and the defendant's general traverse thereto. The defendant's testimony in respect to the deduction of $2,157.35 from the balance due plaintiff on contract no. 32694 was properly received by the commissioner of the court. Since this testimony clearly establishes the fact that plaintiff was indebted to the defendant in the amount of the balance retained, it follows plaintiff is not entitled to recover. The petition must be dismissed and it is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Reporter's Statement of the Case

JOSEPH L. BAKER v. THE UNITED STATES

[No. 42682. Decided February 8, 1937]

On the Proofs

Income tax; taxability of dividends credited to stockholder.—Dividends declared and credited to a stockholder on the books of a corporation, and subject to payment on his demand, were taxable as income to him; and it is immaterial that the cash balance of the corporation was not sufficient at all times to have paid the dividends, if the corporation was solvent and its financial condition such that they could have been paid whenever demanded by the stockholder.

Same; not necessary that dividends be reduced to actual possession.—It was not necessary that dividends credited to the plaintiff stockholder's account on the books of the corporation, and subject to his demand, be reduced to actual possession in order to render them taxable as income to him.

The Reporter's statement of the case:

Mr. Briggs G. Simpich for the plaintiff.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff duly filed his income tax returns for the calendar years 1924 and 1925, showing net income received from salary paid by Baker Ice Machine Co., Inc., of $10,000 per annum, and income from dividends on stock of domestic corporations in the amounts of $15,730.45 and $39,784.61, respectively. The returns did not include dividends credited to plaintiff's account by the Baker Ice Machine Co., Inc., in the years involved. The amounts of tax shown due on the returns were thereafter paid by the plaintiff and are not here in issue. On November 16, 1929, the Commissioner of Internal Revenue assessed additional taxes of $3,713.09 for 1924 and $4,367.42 for 1925, with interest assessments of $956.71 and $961.55, respectively. The deficiencies were based in part on the inclusion in plaintiff's income of dividends constructively received in those years from Baker Ice Machine Co., Inc. The additional assessments were paid as follows:

Reporter's Statement of the Case

1924		1925	
February 3, 1930	$1,070.77	September 10, 1930	$306.97
May 8, 1930	1,674.00	November 5, 1930	558.00
June 2, 1930	558.00	December 2, 1930	558.00
July 1, 1930	558.00	December 9, 1930	558.00
July 31, 1930	558.00	January 2, 1931	558.00
September 10, 1930	251.03	January 6, 1931	558.00
		March 24, 1931	558.00
Total	$4,669.80	April 7, 1931	558.00
		May 2, 1931	558.00
		May 28, 1931	558.00
		Total	$5,328.97

2. On February 16, 1932, plaintiff filed with the collector of internal revenue claims for refund of the additional assessments of $3,713.09 and $4,367.42, plus the interest paid thereon, stating as grounds thereof, for 1924, that the Commissioner had (1) erroneously increased the profit from the sale of certain stock, and (2) erroneously added to income the sum of $28,640 as dividends received from the Baker Ice Machine Co., Inc., and for 1925, that the Commissioner erroneously added to income the sum of $29,688 as dividends received from the same company.

The claims for refund were disallowed by the Commissioner July 2, 1932.

3. Baker Ice Machine Co., Inc., was organized and incorporated in 1919 under the laws of the State of Nebraska for the business of making and selling ice machines and refrigerating plants. The authorized capital stock was $2,000,000, divided into 20,000 shares of the par value of $100 each, of which 15,000 were preferred and 5,000 common. The holders of preferred stock were entitled to an annual cumulative dividend out of net earnings of 8 per cent per annum prior to payment of dividends on common stock.

4. Upon its formation Baker Ice Machine Co., Inc., in exchange for shares of its own stock, acquired assets formerly belonging to another corporation valued at $373,855.82, and the personal demand notes of plaintiff for $626,144.18. The entire 5,000 shares of common stock, par value $500,000, were issued to the plaintiff, together with 3,300 shares of preferred, par value $330,000, and at his direction 1,500

shares of preferred, par value $150,000, to members of his family or trustees therefor, and 200 shares of preferred, par value $20,000, to two officers of the company.

No further shares of common stock other than the 5,000 issued to plaintiff were ever issued by the corporation. In order to raise additional working capital, an attempt was made to sell additional shares of preferred stock to the public; but due to the depression in business, only a few hundred shares were sold, and practically all of these to employees and customers of the company. During the years 1924 and 1925 there were a maximum of 554 of such shares outstanding, which were owned in amounts varying from 1 to 50 shares by sixty-one individuals, with the exception of one employee who owned 100 shares.

Plaintiff was president. Throughout the taxable periods here involved plaintiff's holdings of preferred stock were not less than 3,300 shares. He at all times was the majority stockholder and controlled the company.

5. In 1923 plaintiff's demand notes for $626,144.18 were canceled, notes receivable account was credited with that sum, and corresponding entries were made on the books of the company charging accounts as follows: Good-will, $250,000; Patents, $306,436.14; Machinery & Equipment, $42,260.54; Patterns & Drawings, $27,447.50. The cancellation of plaintiff's demand notes of $626,144.18 was without consideration.

6. Plaintiff was President of Baker Ice Machine Co., Inc., from the date of organization in 1919 to the time he retired from the company in 1932. During the years 1921–1925, inclusive, he received a salary of $10,000 per annum, which was paid in monthly installments of $833.33. A separate salary account for plaintiff was kept by the corporation.

Baker Ice Machine Co., Inc., declared semi-annual dividends on its outstanding preferred stock from the date of organization of the company in 1919 up to and including the year 1925. No dividends were declared on the preferred stock subsequent to the year 1926, but credits were made to the account of plaintiff and members of his family representing March 1, 1926, dividends, which credits were reversed in October 1926. No further credits for preferred

stock dividends were made to the account of plaintiff. No dividends were ever declared on the 5,000 shares of common stock owned by plaintiff. The first year (1920) the preferred stock dividends were paid to all holders of preferred stock. Beginning with the year 1921 and through the year 1925 dividends were paid only to the minority stockholders who were principally customers or employees of the company. Beginning with the year 1921 dividends on the shares of preferred stock owned by plaintiff, the members of his family, or trustees therefor, were not paid to these stockholders, but such dividends were credited to their accounts on the books of the corporation.

7. On February 29, 1924, Baker Ice Machine Co., Inc., declared, as its ninth dividend, a dividend of 8 per cent on all outstanding preferred stock effective March 1, 1924; and like dividends as follows: on August 30, 1924, as of September 1, 1924; on February 27, 1925, as of March 1, 1925; on August 29, 1925, as of September 1, 1925.

On June 30, 1924, Baker Ice Machine Co., Inc., credited to plaintiff's personal account the sum of $14,336.00, representing dividends declared on preferred stock as of March 1, 1924; on June 30, 1925, the company credited to plaintiff's account the sum of $14,304.00, representing dividends declared on preferred stock as of September 1, 1924, and on the same date credited to plaintiff's account $14,852.00, representing dividends declared on March 1, 1925; on June 30, 1926, the company credited to plaintiff's account the sum of $14,836.00, representing dividends declared on preferred stock as of September 1, 1925.

8. Plaintiff's personal account on the books of the corporation to which the foregoing dividends were credited reflected all transactions between the plaintiff and the corporation except $10,000 annual salary, which appeared in a separate account. The personal account carried credits to plaintiff on account of dividends declared but left in the business, interest thereon, plaintiff's advances to the corporation, and expenditures on its behalf. It charged him with withdrawals and expenditures by the corporation on his behalf.

The dividends credited to plaintiff on the books of the corporation were at all times thereafter under plaintiff's

sole dominion and control, and could be withdrawn by him at any time he desired to withdraw them without any restrictions whatever. The financial situation of the corporation was at all times sufficient to make payment of the dividends credited to plaintiff practicable without serious embarrassment to the corporation or the impairment of its financial situation.

9. None of the dividends credited to plaintiff for the years 1924 and 1925 were withdrawn by him from the account, and in the year 1926 the board of directors of the Baker Ice Machine Co., Inc., at the suggestion of the plaintiff, and with his consent, cancelled all unpaid dividends and other items appearing in the plaintiff's personal account and credited the amount thus cancelled to surplus.

10. The balance sheets of the Baker Ice Machine Co., Inc., for June 30, 1924, showed net assets of $1,659,018.60, including a surplus of $127,745.96 after deducting all previously declared dividends. Its net assets as of June 30, 1925, were $1,676,395.82, including surplus of $121,938.23 after deducting all previously declared dividends. The net income of the corporation for the years 1924 and 1925 was $93,834.33 and $92,882.21, respectively.

11. The monthly cash balances of Baker Ice Machine Co., Inc., during the years 1924 and 1925 as reflected by the books of the Omaha and Los Angeles offices were as follows:

OMAHA

	Year 1924	Year 1925
Jan. 1	$23, 102. 28 O. D.	$4, 279. 46 O. D.
Jan. 31	14, 919. 94 O. D.	7, 047. 01 O. D.
Feb. 28	25, 921. 04 O. D.	543. 31 O. D.
Mar. 31	6, 673. 18 O. D.	5, 588. 89
Apr. 30	5, 146. 45	21, 734. 55
May 31	1, 202. 13	5, 277. 46
June 30	4, 173. 12 O. D.	4, 325. 58 O. D.
July 31	13, 894. 54	11, 380. 60
Aug. 31	16, 312. 09	15, 991. 25
Sept. 30	2, 851. 96	3, 287. 48
Oct. 31	4, 614. 00 O. D.	8, 763. 44
Nov. 30	4, 517. 67 O. D.	10, 759. 92 O. D.
Dec. 31	4, 279. 46 O. D.	5, 465. 91 O. D.

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LOS ANGELES

	Year 1924	Year 1925
Jan. 1	$4, 725. 86	$6, 834. 03
Feb. 1	4, 526. 05	5, 987. 61
Mar. 1	7, 160. 05	2, 167. 26
Apr. 1	7, 834. 95	8, 001. 33
May 1	5, 253. 48	12, 543. 97
June 1	5, 661. 70	13, 957. 98
July 1	4, 286. 00	6, 422. 68
Aug. 1	954. 94	9, 695. 69
Sept. 1	8, 393. 92	11, 224. 04
Oct. 1	7, 520. 03	22, 128. 85
Nov. 1	11, 432. 05	15, 708. 39
Dec. 1	7, 045. 37	12, 284. 38

The designation "O. D." in the foregoing schedule refers to overdraft.

The court decided that plaintiff was not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The issue presented in this case is whether dividends in the respective amounts of $28,640 and $29,688 for the years 1924 and 1925, voted on shares of preferred stock in the Baker Ice Machine Co., Inc., owned by plaintiff, are properly includible in his gross income for those years.

The preferred stock of Baker Ice Machine Co., Inc., provided for an 8% annual dividend, to be paid at the rate of 4% semiannually, and such dividends were regularly declared from the date of the company's organization down to and through the years here involved. All the shares of preferred stock, of a par value of $1,500,000, with the exception of about 200 shares, were owned by plaintiff and members of his immediate family. It was the consistent practice of the corporation, when dividends on its preferred stock were voted, to pay the minority stockholders their dividends in cash and to credit dividends of plaintiff and members of his family to their personal accounts on the books of the corporation. This practice was followed in 1924 and 1925, and plaintiff was credited on his personal account with $28,640 for 1924 and $29,688 for 1925, the preferred stock dividends voted to him for those years. This account was

an open one, containing many items in no way relating to dividends, upon which the plaintiff had the unrestricted right to draw at his pleasure. There was no limitation on his right to withdraw the dividends credited to him whenever he saw fit to do so. It appears, however, that no part of the dividends credited to plaintiff for the years 1924 and 1925 was withdrawn by him, and that on January 8, 1926, the board of directors of Baker Ice Machine Co., Inc., formally and with the plaintiff's consent cancelled all unpaid dividends standing to plaintiff's credit ($135,911.83) and credited that amount back to surplus account.

Article 51 of Regulations 65, Revenue Act of 1924, provides:

> Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession.

And in Article 52 of the same Regulations it is stated: "dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the stockholder."

These provisions have been included in all Treasury regulations since 1918 and have been accepted and approved by Congress through subsequent reenactment of the statute. Whether a stockholder actually withdraws from his account moneys representing dividends declared and entered in the account credited to him is not important. It is not necessary that dividends credited to his account be reduced to actual possession in order to make them taxable. They are taxable as income for the year in which they unqualifiedly become subject to the demand of the stockholder.

The plaintiff contends that the dividends in question were not unqualifiedly subject to plaintiff's demand by reason of the financial condition of Baker Ice Machine Co., Inc. It is contended that when the dividends were declared no financial statements were considered by the board of directors and that no attempt was made to determine whether any funds were available to pay them, as is the case when a common stock dividend is declared; it is further contended that it was never intended by the corporation that dividends be paid

plaintiff, or that he should receive such dividends either actually or constructively; that the preferred dividends were declared so that funds could be available for payment of dividends to the minority stockholders, principally employees and customers of the company, in order to maintain the good will of the corporation.

The cash balances of the Baker Ice Machine Co., Inc., as shown by the books of its Omaha and Los Angeles offices, were not sufficient at all times during the years 1924 and 1925 to pay the dividends credited to plaintiff's account, but the cash position alone is not conclusive as to the ability of the company to pay. It is only one of the items going to make up its capital and surplus, *Jacobus* v. *United States*, 80 C. Cls. 357, 9 Fed. Supp. 41; *A. D. Saenger, Inc.*, v. *Commissioner*, 84 Fed. (2d) 23, and the fact that the cash balances may at times fall below the amount of dividends standing on the books to the credit of a stockholder does not of itself establish that the amounts so credited to the stockholder are not available to him. When we look to the financial situation of the Baker Machine Co., Inc., during the years 1924 and 1925, including the cash balances maintained by it, there can be no doubt, we think, that the corporation was at all times in a financial condition to pay the dividends credited to plaintiff. The net assets of the company on June 30, 1924, were $1,659,018.60, including a surplus of $127,745.96 after deducting all previously declared dividends, and its net income for the year was $93,834.33, while its net assets as of June 30, 1925, were $1,676,395.82, including surplus of $121,938.23 after deducting all previously declared dividends, and its net income for the fiscal year was $92,882.21. These figures, all of which are disclosed by the books of the Baker Ice Machine Co., Inc., show beyond question that the company was entirely solvent and a reasonably prosperous concern during the years 1924 and 1925. Even conceding that the assets of the company were carried on the books of the company at an inflated value it had a net income for each of the years of more than $90,000. In view of all the facts and circumstances shown, the conclusion is not only justified but is inescapable that the company's financial condition was such that the dividends credited to plaintiff's

account could have been and would have been paid without embarrassment to the company at any time the plaintiff might have seen fit to withdraw them.

Plaintiff's contention that dividends on the preferred stock of the Baker Ice Machine Co., Inc., were voted for the sole benefit of the minority stockholders, and that it was not intended to pay dividends to plaintiff is not supported by competent proof and is without merit. The policy of the company from its organization in 1919 down to the end of 1925, it is true, was to pay the minority stockholders their dividends in cash and to credit plaintiff's dividends to his personal account with the company. Why this policy was followed does not appear and is not important, as the policy, whatever the reason for it may have been, was dictated by plaintiff who owned all the common stock and was in complete control of the Baker Ice Machine Company, Inc. The important and controlling fact is that dividends voted in 1924 and 1925 on the preferred stock held by plaintiff in the Baker Ice Machine Co., Inc., were credited to his personal account with the company without any restrictions whatever on his right to withdraw them at will. They were unqualifiedly subject to his demand, and the withdrawal of them would not have seriously embarrassed the company or impaired its financial standing.

Plaintiff is not entitled to recover, and the petition is dismissed. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

EDWARD W. COOPER v. THE UNITED STATES

[No. 42692. Decided February 8, 1937]

On the Proofs

Contract for stenographic service; disagreement as to terms of contract; supplemental agreement for settlement of controversy.—Where, in a contract for furnishing stenographic services for the Government, there was a disagreement between the Government and the contractor as to whether the compensation pro-

visions of the contract applied to a certain class of the services performed, and an additional agreement was entered into fixing the compensation for such services, this agreement controlled as to the compensation due for the services.

Contract by correspondence.—It is well settled that an exchange of letters may constitute a valid contract between the parties to the correspondence.

Varying written contract by parole evidence.—Parole evidence is inadmissible to add to or alter in any way the terms of a written agreement.

The Reporter's statement of the case:

Mr. Samuel T. Ansell for the plaintiff. *Mr. Mahlon C. Masterson* of counsel.

Mr. C. Keefe Hurley, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a certified shorthand reporter who has been engaged in the business of making stenographic reports of hearings, conferences, and other meetings and reporting testimony of witnesses, etc., for more than 22 years. His principal place of business now is, and during the period hereinafter mentioned was, in the city of New York, where he has maintained a large office equipment and staff of competent stenographers and typists. During the period in question, namely, from July 1, 1931, to June 30, 1932, in addition to his regular office equipment in New York City, he maintained an office in Washington, D. C., which was in charge of an assistant; and he also had connections with 40 so-called field reporters with headquarters at various points throughout the United States to assist him in the business of reporting whenever called upon to do so. All of the foregoing was necessary to enable him to render prompt and efficient service to the Federal Trade Commission (hereinafter referred to as the "Commission") under the contract hereinafter referred to.

2. At the invitation of the Commission plaintiff submitted a sealed bid for stenographic reporting service to be rendered the Commission during the fiscal year ended June 30, 1932. Other bids were submitted by other reporters, and

the Commission, after considering various factors involved, determined that plaintiff's bid was the lowest of those submitted and accepted plaintiff's bid. A written contract was accordingly entered into June 29, 1931, between plaintiff and the Commission on the basis of the bid submitted by plaintiff.

3. Such contract provided that plaintiff should, during the period from July 1, 1931, to June 30, 1932, stenographically report all hearings before the Commission or before any person or persons designated by the Commission to take testimony or conduct proceedings which it might require to be reported; that in the performance of such services he should at all times be governed by the instructions of the presiding official in matters affecting the composition of the record; that everything spoken during the hearings should be recorded unless the presiding official should otherwise direct; and, further, that plaintiff should perform the work in a businesslike manner and according to the best standards of the reporting profession, and at all times provide as many competent stenographers and maintain such staff and equipment as might be necessary for the prompt furnishing of satisfactory transcripts. The contract further specifically provided for the manner in which the transcripts were to be typed, the quality and size of the paper to be used, the manner of indexing and the arrangement and numbering of exhibits, and the binding of the transcripts. It is also provided that exhibits should not be copied into the record, and photostatic copies of exhibits for inclusion in the record should not be made by the reporter unless the presiding official so directed.

4. Plaintiff was required by the Commission to furnish, and did furnish, a bond in the sum of $5,000 for the faithful performance of the contract.

5. Plaintiff was well equipped to perform all the services required by the Commission under the contract in a businesslike manner and according to the best standards of the reporting profession.

6. Under the terms of the bid, which became part of the contract, plaintiff was "to furnish the labor and material to perform the work mentioned in said contract, under the

conditions and in the manner therein provided and without any further charge" at certain prices. A schedule of the charges read in part as follows:

"The reporter being permitted to sell to the general public copies of transcripts of public hearings, conferences, etc., three (3) copies of transcript (original, first and second carbons) will be furnished the Federal Trade Commission at the following rates:

"For hearings at Washington, D. C.:	*Per page* [1]
(Item 1) Ordinary copy [2]	50 cents
(Item 2) Daily copy [3]	75 cents
"For hearings at other points in the United States:	
(Item 3) Ordinary copy [2]	50 cents
(Item 4) Daily copy [3]	75 cents
(Item 5) If and when ordered by the Commission, additional single copies will be furnished of item 1 at	5 cents
Item 2 at	5 cents
Item 3 at	5 cents
Item 4 at	5 cents

"[1] The per-page rate on items 1, 2, 3, and 4 is for three copies of transcripts. It is not a per-page per copy rate.

"[2] 'Ordinary copy' contemplates delivery of transcript to the Commission within two weeks after the close of each day's hearings.

"[3] 'Daily copy' contemplates delivery of transcript of a day's hearings not later than 9 a. m. the following morning."

"If the reporter elects to mimeograph transcript, five (5) mimeographed copies shall be furnished the Commission in lieu of the three typewritten copies contracted for, and at the same total cost.

"(Item 6) If and when ordered by the Commission, additional single mimeographed copies will be furnished of item 1 at	3 cents
Item 2 at	5 cents
Item 3 at	3 cents
Item 4 at	5 cents

The three copies of the transcripts referred to above under designations "Ordinary copy" and "Daily copy" contemplated the original and first and second carbons. The price to be paid plaintiff for exhibits when copied into the record at the direction of the presiding official was the same as for other pages of the transcript. Plaintiff was required to report proceedings and hearings in any place designated

by the Commission within the territorial limits of the United States at the rates set out in the contract, and whatever expense was incurred on account of travel or other incidental expenses in rendering such service was borne by plaintiff, the measure of the compensation to plaintiff for all services to be rendered (insofar as here material) being fixed by the schedule of rates heretofore referred to.

7. Under the contract, plaintiff, assisted by his staff of reporters, reported the proceedings and testimony taken before the Commission in nine so-called *Hat cases*, designated as docket nos. 1895 to 1904, inclusive, except docket no. 1900. Each of these cases was a separate case against separate respondents; and, after hearing some specific testimony in various cases, the Commission, through its attorney, instructed its examiner, the presiding officer at a hearing of the Commission in one of the *Hat cases* mentioned, as follows:

"Now, Mr. Examiner, I wish you would instruct the reporter that the proceeding today and from now on, with reference to all of it, except testimony which we may hereafter take as to particular respondents, being general testimony, applying to all these *Hat cases*, shall be transcribed and included in the minutes in the record of each one of these cases from 1895 to 1904, inclusive, with the exception of docket number 1900, as if taken separately in each case. That will save the trouble and time of doing it in each case separately."

8. Plaintiff, in compliance with the instructions of the the examiner, and acting in good faith, transcribed and reported the testimony in the nine so-called *Hat cases* in accordance with the foregoing instructions of the examiner, and furnished the Commission with an original and a first and a second carbon of a transcript in each of the cases with his certificate attached to the original of each case. The general testimony taken in the one case constituted the greater part of the transcript in each of the nine cases. While such general testimony was the same in each of the cases, the transcripts differed in certain respects, including names of respondents, particular testimony applicable only to a given case, notations as to the offering and marking of

exhibits, exhibit numbers, index, and page numbers. It was accordingly necessary to prepare an entirely separate transcript, original and a first and a second carbon thereof, in each case, and it was not possible to use carbons of the general testimony for insertion in the various cases. The work, however, in preparing each of the cases, except the first case in which the general testimony was taken, was substantially less than that required in the first case though it was substantially greater than would have been required for the preparation of additional copies of the completed transcript of the first case.

9. Where testimony is given in one case which is general in the sense that it is to be used in other cases with other testimony or other parts of the records in those cases in the preparation of a complete transcript in each case and where the amount of such general testimony is small as compared with the entire contents of the completed transcripts, the well-established practice in the reporting profession is to charge the same rate for each page of such other cases as for each page of the original case. However, under the same conditions, except that the general testimony constitutes the major portion of each record, there is no well-established practice in such profession for the rate to be charged on account of the general testimony used in the preparation of the complete records in other cases, some reporters making the same charge in all cases and others recognizing the situation as calling for a reduction in the rate to be charged for each page in the subsequent cases where the general testimony is used.

10. In reporting the nine so-called *Hat cases*, plaintiff furnished to the Commission a separate and complete transcript in each of the cases, the total number of pages for the nine cases being $7{,}563\frac{19}{25}$. Of the total number of pages, $7{,}455\frac{24}{25}$ pages consisted of general testimony and the balance, $107\frac{20}{25}$ pages, consisted of testimony or parts of the record which were applicable only to particular cases.

From time to time as the work was completed, plaintiff delivered the transcripts to the Commission and submitted vouchers for the payment thereof at 50 cents a page. After

all work had been completed and delivered and all vouchers submitted on that basis, but prior to payment of all vouchers, the circumstances under which the transcripts had been prepared, that is, the preparation thereof in accordance with the instructions of the examiner as shown in findings 7 and 8, came to the attention of the Commission. At that time, on or about May 12, 1932, vouchers had been approved for payment and payment had been made for $6{,}074\frac{23}{25}$ pages at 50 cents a page. When these vouchers were approved and passed for payment, the section of the Commission which audited the vouchers was unaware of the circumstances surrounding the preparation of the transcript.

11. May 12, 1932, the Commission wrote plaintiff calling attention to a question which had been raised as to the payment of the vouchers, on account of the use of the general testimony in the preparation of the transcripts, and suggesting a conference "with the view of arriving at some appropriate adjustment of the question." The letter stated further that in the meantime payment of the recent vouchers was being withheld. Shortly thereafter a conference was held in Washington, D. C., between plaintiff and a representative of the Commission with respect to the question raised in the foregoing letter. At the conference the Commission took the position that the contract of June 29, 1931, did not cover the class of services rendered by plaintiff in the preparation of these transcripts, whereas plaintiff took the position (which he has always adhered to), that the rate of 50 cents a page provided in the contract was applicable. However, in view of the controversy which had arisen, an effort was made to arrive at a fair rate for the services as a basis of settlement. May 15, 1932, at or shortly after the conference and before plaintiff left the offices of the Commission, plaintiff, at the request of the assistant secretary of the Commission, wrote a letter to the Commission in which he outlined the manner in which the transcripts had been performed, the cost of such work, and stated therein in part as follows:

"Surely, the provision for 5¢ for copies in my contract was not meant to cover anything copied from one docket to another; and I respectfully submit that the provision in my

contract which says: 'The price per page for copied exhibits shall be the same as for other pages of the same transcript', should govern here. If, for instance, testimony offered in one docket were offered to be copied in to another docket, this provision would apply; and I was, in effect, directed by the presiding official so to do, as specified in the contract.

"However, it is plain from my conference with Mr. Duganne that there is a claimed misunderstanding here, and that there should be a settlement accordingly.

"In view of the fact that the price paid is low for the service rendered, that it has become, through depressed conditions, virtually impossible to sell copies to any extent to make the contract profitable, and it has not been possible, to date, to sell any copies of these hat cases, I think I should receive some consideration in any settlement.

"It has cost me, in cold cash, out of pocket, about four hundred dollars more for the 1,649 pages of original matter, than I could receive from the Commission under my contract. In addition, including 20¢ a page typing, cost of paper, cost of covers, overseeing and inspection and extra clerical work for the separating, indexing, binding, marking of exhibits in each case, extra checking, counting, and so forth, it has cost me for the about 7,120 pages of retranscribed matter, about $2,848, which would make about $3,250, I am out, as against about $3,560 billed the Commission, some of which I have received and some not yet.

"Considering that I have had heavy losses on several cases during the year, which I have borne without complaint, that I am not allowed even a portion of the telegraphic expense, under a recent ruling of the Comptroller, that I have to pay minimum attendance charges and traveling expense and do a great deal of administrative and pay for twice as much clerical work as my entire office would otherwise require; and that, I believe, my service has been entirely satisfactory to the Commission, it would seem that I should receive the advantage of a fair interpretation of my contract, or, if a settlement must be made, the advantage of all the cost I have had to go to in furnishing the special service in these instances.

"I would suggest that an allowance of 35¢ a page, in that event, would be low, totaling about $2,492, or a saving to the Commission of $1,068, approximately $750 of which will be actual net loss to me."

12. May 27, 1932, the Commission replied to plaintiff's letter of May 15, 1932, stating that the latter had been considered and that May 18, 1932, the Commission "authorized the payment to the reporter of 30¢ per page for original and two carbons for the transcript in question and directed that the difference between the 50¢ per page charged for such transcript by the reporter and the 30¢ per page authorized by the Commission for such transcript be recovered and turned into the Treasury." The letter further stated in part:

"There are being returned to you, under separate cover, all unpaid vouchers except one voucher in docket 1895 for $26.86, and one in docket 1896 for $26.86, both for transcript of April 8, 1932, which apparently have been mislaid, at least they can not be found at this writing. Please submit new vouchers to cover those returned and the two missing vouchers on the basis of the above authorized rates, and forward same to this office for settlement at your earliest convenience.

"It will be impossible to credit your account with the amount of the vouchers which are being returned for rebilling, due to the fact that the entire transaction must be shown in order to enable the proper auditing thereof by the General Accounting Office.

"A collection voucher for the entire amount of the refund due the Commission, $1,222.86, will be forwarded to you when the payments completing the transaction are made."

13. May 28, 1932, plaintiff transmitted to the Commission vouchers revised at the rate specified in the Commission's letter of May 27, 1932, such vouchers being accompanied by a letter of transmittal which read in part as follows:

"I am assuming that docket 1895 is the criterion, always, for the original pages; and other dockets as inserted pages. You will note that some hearings in 1901 were all original, and I will ask that you check this as to the latter part,

so that we will know that, once this is done, it is done right. My pages do not agree with the pages in the letter, but part of this is accounted for by unpaid vouchers.

"Prompt action, and advice as to the exact figures will be appreciated, as I shall try to hold a sufficient balance here for several days to enable me to settle your collection voucher immediately upon receipt, and thus end happily an unpleasant situation."

14. May 31, 1932, the Commission wrote plaintiff as follows:

"The Commission is in receipt of your letter of May 28, 1932, and all revised vouchers forwarded therewith have been passed for payment. In order that you might have before you all unpaid vouchers for consideration in connection with the Commission's letter of May 27, 1932, there were forwarded you four vouchers for original pages which needed no revision, as follows:

Transcript—April	8	$26.86
April	11	51.34
April	13	15.22
May	3	21.86

These will be passed for payment as soon as returned to this office.

"The second paragraph of your letter is not clear, and your question is not understood. Of course, all pages in docket 1895 were original pages and copies of those pages placed in other dockets have been designated as 'inserted' pages. There were, of course, original pages in dockets other than 1895 for which the full 50¢ rate is allowed.

"So far as the records of the Commission are concerned, with all vouchers up to May 27, 1932, passed for payment in accordance with the Commission's letter of that date, there is a refund due the Commission of $1,222.86. Your check for that amount will correct the account in this group of cases to May 27, 1932, and all vouchers subsequent to that date will be promptly passed for payment if rendered in accordance with the authorization quoted in the Commission's letter above referred to."

June 1, 1932, plaintiff replied to the foregoing letter as follows:

"I think, with your letter of May 31st all is clear; and I am arranging to hold funds which, with the amount now due on revised bills, will amount to $1,222.86, so that I may forward check to you immediately upon receipt of payment therefor with your collection voucher."

15. At or about the time of the controversy referred to above, the Commission was receiving bids for reporting services for the fiscal year ended June 30, 1933, and plaintiff, along with other reporters, submitted a bid for the performance of such services. When the bids were opened and considered the Commission found that plaintiff was not the lowest bidder and awarded the contract to another reporter. Thereafter plaintiff demanded payment on all vouchers for the transcripts in the nine so-called *Hat cases* at 50 cents a page. In the meantime the revised vouchers had been forwarded to the Comptroller General who considered the demand of plaintiff and refused to make settlement other than on the basis of the correspondence heretofore referred to, namely, 30 cents a page for the pages of general testimony and 50 cents a page for original testimony. On that basis the Comptroller General found a balance due the United States of $746.77, determined as follows:

DEBITS

Amount previously paid for transcripts of hearings held prior to April 1932, 6,074 23/25 pages at 50 cents a page		$3,037.46

CREDITS

7,455 24/25 pages at 30 cents a page	$2,236.79	
107 20/25 pages at 50 cents a page	53.90	
Total amount due		2,290.69
Balance due the United States		746.77

16. The tabulation set out above in finding 15 correctly reflects the amount paid plaintiff on account of the work performed on the nine so-called *Hat cases* as well as the amount due the defendant in the event the correspondence and acts

of the parties set out in findings 11, 12, 13, and 14 constitute the proper basis for payment for the work performed.

In the event it should be held that plaintiff is entitled to be paid 50 cents a page for each page of transcript furnished on these cases, there is a balance due plaintiff of $744.42, computed as follows:

7,563 19/25 pages at 50 cents a page	$3,781.88
Less amount previously paid plaintiff	3,037.46
	744.42

The court decided that the plaintiff was not entitled to recover, and that the Government was entitled to recover on its counterclaim.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff is a certified shorthand reporter who for many years has been engaged in the business of making stenographic reports of hearings, conferences, and other meetings, and reporting the testimony of witnesses, etc.

Upon invitation of the Federal Trade Commission, plaintiff submitted a sealed bid for stenographic reporting service to be rendered the Commission during the fiscal year ending June 30, 1932. Plaintiff's bid being lower than the bids submitted by other reporters, he was awarded the contract, which was entered into on June 29, 1931.

The contract provided that the plaintiff should, during the period from July 1, 1931, to June 30, 1932, stenographically report all hearings before the Commission or before any person or persons designated by the Commission to take testimony or conduct proceedings which it might require to be reported; that in the performance of such services he should, at all times, be governed by the instructions of the presiding officer in matters affecting the composition of the record; that everything spoken during the hearing should be recorded unless the presiding officer should otherwise direct; and, further, that the plaintiff should perform the work in a businesslike manner and according to the best standards of the reporting profession, and at all times provide as many competent stenographers

and maintain such staff and equipment as might be necessary for the prompt furnishing of satisfactory transcripts. The contract further specifically provided for the manner in which the transcripts were to be typed, the quality and the size of the paper to be used, the manner of indexing, and the arrangement and numbering of the exhibits, and the binding of the transcripts. It also provided that exhibits should not be copied into the record, and photostatic copies of exhibits for inclusion in the record should not be made by the reporter unless the presiding official so directed.

Under the terms of the bid, which became a part of the contract, the plaintiff was "to furnish the labor and material to perform the work mentioned in said contract, under the conditions and in the manner therein provided and without further charge" at certain prices. The schedule of charges provided that he should receive 50¢ a page for ordinary copy (ordinary copy meaning one delivered to the Commission within two weeks after the close of each day's hearing; and the per page rate being for three copies of the transcript, the original and first and second carbon), and 75¢ a page for daily copy (daily copy meaning one delivered not later than 9:00 A. M. the morning following the hearing). The contract permitted of the plaintiff selling to the general public copies of transcripts of public hearings, conferences, etc. The price to be paid plaintiff for exhibits when copied into the record at the direction of the presiding official was the same as for other pages of the transcript. The plaintiff was required to report proceedings and hearings in any place designated by the Commission within the territory and the limits of the United States at the rates set forth in the contract and whatever expense was incurred on account of travel or other incidental expenses in rendering such service was to be borne by plaintiff, the measure of the compensation to plaintiff for all services to be rendered being fixed by the rates heretofore mentioned.

Plaintiff maintained a large staff of competent stenographers and performed the services required of him under the contract to the entire satisfaction of the Commission. Part of the work performed by plaintiff consisted in reporting

the proceedings and testimony taken before the Commission in nine cases, which were referred to and designated as the *Hat cases*, appearing on the docket as Numbers 1895 to 1904, inclusive, except docket Number 1900. Each of these cases was a separate case against separate respondents; after some specific testimony had been taken in various cases, the Commission, through its attorney, instructed its examiner, the presiding officer at the hearing, as follows:

> Now, Mr. Examiner, I wish you would instruct the reporter that the proceedings today and from now on, with reference to all of it, except testimony which we may hereafter take as to particular respondents, being general testimony, applying to all these *Hat cases*, shall be transcribed and included in the minutes in the record of each one of these cases from 1895–1904, inclusive, with the exception of docket Number 1900, as if taken separately in each case. That will save the trouble and time of doing it in each case separately.

Plaintiff complied with these instructions and in reporting the testimony in the nine so-called *Hat cases*, furnished the Commission with an original and first and second carbon copies of the transcript of each of the cases, with his certificate attached to the original of each case. The total number of pages furnished the Commission, including specific testimony which was applicable to a particular case and general testimony which was applicable to all nine cases, was 7,563 19/25. Of this total number, 7,455 24/25 pages consisted of general testimony and 107 20/25 pages consisted of specific testimony.

While the general testimony was the same in each of the cases, the transcript differed in certain respects, including names of the respondents, particular testimony applicable only to a given case, notations as to the offering and marking of exhibits, exhibit numbers, index, and page numbers. It was accordingly necessary to prepare an entirely separate transcript, original, and first and second carbons thereof, in each case, and it was not possible to use carbons of the general testimony for insertion in the various cases. The work, however, in preparing each of the cases, except

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the first case, in which the general testimony was taken, was substantially less than that required in the first case, although it was substantially greater than would have been required for the preparation of additional copies of the completed transcript of the first case.

From time to time, as the work was completed in the *Hat cases*, plaintiff delivered the transcripts to the Commission and submitted vouchers for the payment thereof at the contract rate of 50¢ a page. After all work had been completed and delivered and all vouchers submitted on that basis, but prior to payment of all vouchers, the circumstances under which the transcripts had been prepared, that is, the preparation thereof in accordance with the instructions of the Examiner, came to the attention of the Commission. At that time vouchers had been approved for payment and payment had been made for 6,074 23/25 pages at the fifty-cents a page rate. The Commission wrote to plaintiff calling attention to this fact and raised the question as to whether or not the rate of 50¢ a page provided in the contract was applicable to this work and suggested a conference "with the view of arriving at some appropriate adjustment of the question." Shortly thereafter the conference suggested by the Commission was held between plaintiff and a representative of the Commission. At this conference the Commission took the position that the contract did not govern the class of service rendered by plaintiff in the preparation of the transcript in the *Hat cases*, and plaintiff took the position that the regular 50¢ a page rate provided in the contract was applicable to the work. Not being able at the conference to arrive at an adjustment of the controversy in respect to the pay plaintiff was entitled to receive for this work, a series of letters was thereafter exchanged between the plaintiff and the Commission. This correspondence is fully set out in the Findings of Fact and need not be restated here in detail. It is sufficient to say that through this correspondence plaintiff and the Commission reached an agreement that the Commission would pay, and plaintiff would accept, 30¢ a page as compensation for services performed in the nine *Hat cases*, and that plaintiff

would refund the difference between the 50¢ a page received by him for work already paid for and the 30¢ a page agreed upon.

Although plaintiff revised all unpaid vouchers to conform to the agreement of 30¢ a page for transcript in the *Hat cases*, and forwarded them to the Commission, he failed to refund the difference between the 50¢ a page rate received by him for transcript already paid for and the 30¢ a page agreed upon as compensation for the work. He now brings suit and demands payment at the rate of 50¢ a page for transcript furnished in all nine *Hat cases.* The defendant has filed its counterclaim for $746.77, the difference between the amount of compensation plaintiff was entitled to receive on the basis of 30¢ a page for transcript and the amount already received by him on the basis of 50¢ a page.

The rule is so well settled and the principle involved is so elementary that an exchange of letters may constitute a valid contract, that a citation of supporting authorities is not necessary. The parties here found themselves in disagreement as to whether the services involved fell within the contract provisions of 50¢ a page for transcript furnished. The plaintiff contended that it did, and the defendant maintained that it did not. Undoubtedly it was competent for them, if they saw fit to do so, to enter into a new contract covering such services. This they did and reached an agreement through an exchange of letters. Plaintiff does not contend that these letters standing alone and of themselves do not constitute a new contract whereby the defendant agreed to pay and plaintiff agreed to accept 30¢ a page for the transcript involved, but says that he agreed to the rate of compensation of 30¢ a page for transcript in these cases *only* in the event that his contract with the Commission would be renewed for another year, thereby enabling him to make up to some extent for the loss resulting from the proposed adjustment, and asks the court to make a finding to that effect. There is nothing in the letters exchanged by plaintiff and the defendant in respect to the controversy on which a finding such as that requested

can be based. The renewal of plaintiff's contract for another year is not mentioned or referred to by either party in the correspondence through which the agreement was reached. The only basis for the finding requested is an alleged oral agreement between plaintiff and a representative of the Commission to the effect that his contract with the Commission would be renewed for another year, provided he agreed to the adjustment then under consideration. Aside from the fact that the representative of the Commission who plaintiff says made this oral agreement with him categorically denies having made such agreement, and the agreement is therefore not proven, plaintiff's requested finding may not be made for the reason that parol testimony is inadmissible to add to or alter in any way the terms of a written agreement. *Emerson* v. *Slater*, 22 How. 28; *De Witt* v. *Berry*, 134 U. S. 306; *Thompson* v. *Insurance Company*, 104 U. S. 252.

We are not here concerned with the question of whether plaintiff under a correct interpretation of the original contract was entitled to be paid 50¢ a page for the transcript in the nine *Hat cases*. The original contract in so far as the services under consideration are concerned was abrogated when the parties entered into a new contract specifically fixing the rate of 30¢ a page for transcript. The services had been completely performed when the defendant raised the question as to the rate of compensation. Not only had the services been performed, but plaintiff had received pay at what he claimed was the proper rate under the contract for the major portion of the services. Plaintiff in these circumstances had the right to stand on his claim that the work fell within the original contract provision of 50¢ a page for transcript, and insist on the payment of unpaid vouchers on that basis. He did not, however, elect to take this course but chose rather to negotiate a settlement of the controversy with the defendant, as a result of which the defendant agreed to pay and plaintiff agreed to accept as compensation for the services already performed 30¢ a page for transcript furnished. Plaintiff voluntarily entered into this agreement, and it is binding upon him.

It must therefore be held that plaintiff is not entitled to recover on the petition and that the defendant is entitled to recover the amount of its counterclaim, $746.77. Judgment in that amount is awarded the defendant. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

RUTH C. BROCK, CHARLES M. BROCK, AND THOMAS O. BROCK, ADMINISTRATORS OF THE ESTATE OF O. B. BROCK, DECEASED, v. THE UNITED STATES

[No. 42853. Decided February 8, 1937]

On the Proofs

Contract for Government timber; excess over estimated quantities.—Where a contract for purchase of Government timber was for all of certain kinds of timber on a specified area, estimated quantities of which were stated in the contract, the contract was for all of the specified timber on the area, and was not for, or limited by, such estimated quantities.

The Reporter's statement of the case:

Mr. Horace S. Whitman for the plaintiff.

Mr. Paul A. Sweeney, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff on June 15, 1928, entered into a timber sale agreement with the United States, acting through C. L. Perkins, Forest Supervisor of the Forest Service of the Department of Agriculture, whereby the plaintiff agreed to purchase from the United States at specified rates, and cut and remove under prescribed conditions, certain quantities and kinds of timber from about 188 acres to be definitely designated on the ground by a Forest officer prior to cutting, in the Bearwallow Run Unit, watershed of East Fork of

the Greenbrier River, East Greenbrier Working Circle, Pocahontas County, West Virginia.

The contract, which is made a part of this finding by reference, stated:

> The estimated amount to be cut under the methods of marking described in section 4 is 493 M feet B. M. of sugar maple; 176 M feet B. M. of beech; 96 M feet B. M. of birch; 47 M feet B. M. of basswood, and 13 M feet B. M. of other hardwoods, more or less.

The plaintiff owned an adjoining tract of land on which he had conducted lumbering operations. The advertisement and sale of the timber in question was made on plaintiff's request and he was afforded an opportunity to examine the timber tract before entering into the contract.

2. The plaintiff agreed to pay for the lumber cut the following prices:

$4.45 per M feet B. M. for sugar maple;
$1.70 per M feet B. M. for beech;
$1.70 per M feet B. M. for birch;
$3.35 per M feet B. M. for basswood; and
$2.25 per M feet B. M. for other hardwoods.

3. The estimated quantities of the various kinds of timber to be cut, as set forth in Finding No. 1, were arrived at by an actual cruise made by Forest Service employees, in which cruise 10 percent of the area to be cut over was covered. As plaintiff proceeded with the work of removing the trees designated for cutting on the premises it developed that the quantities of the various kinds of timber to be cut had been greatly underestimated in the cruise made by the defendant's employees and this was particularly true in respect to the beech timber.

The Forest Service designated for cutting, and required plaintiff to cut and log 397,140 feet of beech timber. Plaintiff protested to the Forest Service from time to time as to the amount of beech timber he was being required to cut, and when he was nearing the completion of the work the Forest Service notified him that he would not have to cut any more beech, and also notified him that he would not be required to pay the Government the contract price for 66,590 feet of beech that had already been felled and cut into logs.

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There remained 50,000 feet of beech timber standing on the tract which plaintiff was not required to cut.

The following table shows the facts with regard to the estimated quantities of the various kinds of timber to be cut as stated in the contract, and the quantities thereof actually cut under the contract:

Species	Contract Estimate	Percent of Total Estimate	Actually Cut and Paid for	Percent of Total Cut	Overcut Above Estimate	Overcut Percent of Estimate
Sugar Maple	493,000	60	624,555	[1] 54	131,555	26.68
Beech	176,000	21	330,550	[1] 29	154,550	[2] 87.81
Birch	96,000	12	100,745	9	4,745	4.95
Basswood	47,000	5	60,060	5	13,060	27.79
Others	13,000	2	36,020	3	23,020	177.08

[1] These figures would be respectively 51.26 and 32.5 if the 66,590 feet felled and left on the ground are taken into account.

[2] This figure would be 125.65% if 66,590 feet actually felled but not paid for to United States are considered; and 154.03% if 66,590 feet cut and 50,000 feet not cut are considered.

Disregarding the figures for beech, the overcut of all other varieties is 26.56% of the amounts estimated. The beech was the only variety of lumber, except the small item headed "Others", in which the amount actually cut was in greater proportions to the total cut than the amount estimated for the several items bore to the total amount estimated.

4. Plaintiff sustained a net loss of $3,088.32 on the beech timber cut and logged by him under the contract.

5. Both the plaintiff and the Forest Service knew at the time the contract was entered into that beech timber, and hence beech lumber, was of low value, and that lumber from the small trees of that species, which were specified to be cut, would not ordinarily be as good and valuable lumber as that from large trees. Plaintiff realized that the cost of cutting and removing the beech timber, and disposing of the lumber therefrom, might not be profitable at the prices stipulated in the contract, and that it might result in a loss to him, but relied upon the fact that the proportion of beech to be cut to the total timber to be cut was such that he would be able to make up any loss on the beech from profits made on the other and more valuable kinds of timber to be cut under the contract.

The court decided that plaintiffs were not entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

Mr. O. B. Brock, the original plaintiff in this case, in June 1928, entered into an agreement with the United States, acting through the Forest Supervisor of the Forest Service of the Department of Agriculture, whereby he agreed to purchase from the United States, at specified rates, and cut and remove under prescribed conditions, certain quantities and kinds of timber from 188 acres of land located in the State of West Virginia. Since the filing of the petition and the taking of the evidence in the case, Mr. Brock died, and the administrators of his estate have been substituted as parties plaintiff. Wherever the word "plaintiff" appears in the findings of the court and in this opinion, it refers to Mr. O. B. Brock, and not to the administrators of his estate.

The 188 acres to be cut over adjoined lands owned by the plaintiff upon which he had conducted timber operations, the exact location of the tract being shown on a map attached to the contract. Under the contract the plaintiff was to cut such timber only as was marked and designated by an officer of the Forest Service, prior to the cutting.

Prior to the making of the contract employees of the Forest Service made a cruise of the 188-acre tract for the purpose of estimating the quantities of various kinds of timber to be cut. The estimated amount to be cut is stated in the contract to be:

> 493 M feet B. M. of sugar maple; 176 M feet B. M. of beech; 96 M feet B. M. of birch; 47 M feet B. M. of basswood, and 13 M feet B. M. of other hardwoods, more or less.

After the making of the contract, the defendant, through its proper employees, proceeded to designate and mark the trees to be cut and plaintiff began the work of cutting and removing the timber so marked. As the work progressed it developed that the estimate in the contract of the quantities of the various kinds of timber to be cut was greatly understated, particularly in respect to the beech. The de-

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fendant designated for cutting, and the plaintiff actually cut and logged, 397,140 feet of beech timber, which was 125.65% over the contract estimate for beech. Because of complaints made by the plaintiff of the overcut of beech, the defendant notified plaintiff that he would not be required to pay the Government the contract price for 66,590 feet of beech that had already been cut into logs, and that he would not be required to remove the same, and also that the plaintiff would not be required to cut 50,000 feet of beech timber left standing on the tract. The plaintiff, however, actually cut and paid for 330,550 feet of beech timber, or 87.81% over the contract estimate for beech timber, on which he sustained a net loss of $3,088.32.

The plaintiff, in this action, seeks to recover his loss on the beech timber. It is urged plaintiff entered into the contract knowing that he might suffer a loss on the beech timber to be cut from the Government's land, but relied upon the fact that he would realize a profit on the more valuable timber more than enough to equalize any loss he might suffer on the beech; that he relied upon the statements in the contract as to the estimated quantities of the timber to be cut; that he had no way of making intelligent estimates of the timber to be cut by him and was compelled to rely upon the estimates made by the defendant; and that the loss sustained by him was a direct result of the defendant's inaccurate and misleading estimates. He bases his right to recover upon the authority of *Dunbar & Sullivan Dredging Co.* v. *United States*, 65 C. Cls. 567, and the Supreme Court cases there cited.

In the *Dunbar & Sullivan Dredging Co.* case the plaintiff entered into a contract with the Government to perform certain dredging in the channel of the Niagara River. The Government's specifications of the work to be done upon which plaintiff's bid was predicated, stated: "The material to be removed is believed to be sand, clay, gravel, and boulders." It was further stated in the specifications that "bidders are expected to examine the work and decide for themselves as to its character and to make their bids accordingly." After work was commenced under the contract

it was discovered that a large part of the material to be dredged was wholly different in character from the material described in the specifications of the contract and that it consisted principally of a material commonly known to dredging contractors and engineers as "hardpan", a material much more difficult to excavate than that described in the specifications. The cost of excavating hardpan was shown to be about twice the cost of excavating materials described in the specifications. Upon these facts the court held that the contractor was entitled to recover the extra cost incurred by him in the excavation of the hardpan, basing its decision largely on *Hollerbach* v. *United States*, 233 U. S. 165, where it was said:

> We think this positive statement of the specifications must be taken as true and binding upon the Government, and that upon it rather than upon the claimants must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government as a basis of the contract left in no doubt.

The facts in the instant case in our opinion do not bring it within the rule announced in the *Hollerbach* case and followed by this court in the *Dunbar & Sullivan Dredging Co.* case. The statement in the contract of the estimated quantities of the various types of timber on the area to be cut, followed by the words "more or less", did not constitute a warranty and was not a representation binding on the defendant such as the positive statement in the specifications of a contract as to the character of the work to be performed. It was merely an estimate of the probable amounts of the various kinds of timber bought and sold under the contract, in reference to which good faith is all that was required on the part of the defendant.

The contract provided for the purchase and sale of all "merchantable dead timber standing and down on the area designated for cutting by the Forest Officer, and not less

than 85% by volume of the total stand of merchantable hardwood timber." The contract further provided:

> All sugar maple will be cut to 16 inches and over in diameter 4½ feet above the ground; all basswood will be cut to 16 inches and [over in] diameter 4½ feet above the ground; all beech, birch, and other hardwoods will be cut to 10 inches and over in diameter 4½ feet above the ground; to be marked for cutting by the Forest Officer in charge in conformity with the methods exemplified by the sample marking examined and accepted by us. Trees over these diameters may be left at the discretion of the Forest Officer, or trees under these diameters may be marked for cutting if their removal is considered necessary by the Forest Officer in charge.

These contract provisions bring the case within the class of cases where a contract is made for the sale of goods identified by certain independent circumstances. The applicable rule in such cases is stated in *Brawley* v. *United States*, 96 U. S. 168:

> Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of "about", or "more or less", or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. In such cases, the governing rule is somewhat analogous to that which is applied in the description of lands, where natural boundaries and monuments control courses and distances and estimates of quantity.

Plaintiffs are not entitled to recover, and the petition is dismissed. It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED, v. THE UNITED STATES

[No. 43181. Decided February 8, 1937]

On the Proofs

Income tax; amendment of refund claim after statute has run.—A claim for refund of income tax may be amended to include new items of claim after the statute of limitations has run against the filing of a new claim if the amendment be filed before final action by the Commissioner of Internal Revenue on the original claim.

The Reporter's statement of the case:

Mr. Fred R. Seibert for the plaintiff.

Mr. George W. Billings, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a citizen of the United States, residing at Gates Mills, Ohio, and is the duly appointed executrix of the estate of Matthew Andrews, deceased.

2. On or about March 15, 1931, plaintiff as such executrix duly filed an individual income tax return for the calendar year 1930, for the income of the estate of Matthew Andrews, deceased. The return disclosed a total tax due of $12,800.30, which was duly paid in quarterly installments, as follows:

March 15, 1931	$3,200.30
June 15, 1931	3,200.00
September 15, 1931	3,200.00
December 15, 1931	3,200.00

The gross income shown on the return included the amount of $110,891.50, representing dividends from domestic corporations. Of this amount, $36,750.00 was reported in the return as dividends received in the year 1930 from The M. A. Hanna Company.

3. The amount of $36,750.00, reported as dividends received from The M. A. Hanna Company, was derived from the following transaction: Plaintiff, prior to the year 1930, owned 1,500 shares of the original Seven Percent Cumulative First Preferred Stock Series "A" of The M. A. Hanna Company. As a result of a recapitalization of this company in November and December 1929, plaintiff was given the privilege of exchanging the aforesaid original stock on the basis of one share of the original stock for 1.27 shares of a new issue of $7.00 Cumulative Preferred Stock, the plan including an understanding that the fractional .27 shares of the new stock could be disposed of to the underwriting firm handling the transaction, for $24.50 in cash for each fractional .27 share of the new stock. Plaintiff exercised the privilege so obtained and received thereby $36,750.00 in cash, in addition to 1,500 shares of the new stock, which amount in cash, as above stated, was reported in the income tax return as dividends received from The M. A. Hanna Company.

4. In December 1931, plaintiff was advised by the Internal Revenue Agent in Charge that the return as filed, reporting the sum of $36,750.00 as dividends was considered as correct, with the added proviso that such finding was subject to the approval of the Bureau of Internal Revenue in Washington, D. C., and that should subsequent information be received which would materially change the amount of tax reported, it would be necessary, under existing laws, to redetermine the tax liability.

5. On June 15, 1932, plaintiff filed with the Collector of Internal Revenue claims for refund in the amount of $420.00, on the ground that the profit resulting from the sale of 700 shares of the common stock of the Hanna Company had been incorrectly computed. This claim for $420.00 was allowed in full, Certificate of Overassessment issued by the Commissioner of Internal Revenue September 24, 1932, and the amount sought in this claim paid with interest.

6. In a letter dated October 6, 1932, following conferences with representatives of The M. A. Hanna Company, the

Commissioner of Internal Revenue advised the Internal Revenue Agent in Charge, at Cleveland, Ohio, that the amounts of cash received by plaintiff and other shareholders of the Hanna Company, as above stated, represented proceeds from the sale of the fractional shares of new stock, and that gain or loss from such sale should be determined upon the basis of the original stock in the hands of the plaintiff and the other shareholders.

7. On or about February 2, 1933, plaintiff filed a claim for refund in the amount of $995.52. The grounds upon which refund was sought in this claim were stated in the claim as follows:

> First: Because a loss of $4,250.00 occurred in year 1930 on 320 shares of the common stock and 10 shares of the preferred stock of American Cuptor Corporation on which a valuation for purposes of the Federal Estate Tax was established as of January 5, 1929, in the amount of $4,250.00. American Cuptor Corporation became insolvent and this stock became worthless in the year 1930.
>
> Second: Loss is claimed on 160 shares of the preferred stock of Bertha-Consumers Company on which the value for Federal Estate Tax purposes was established as of January 5, 1929, at $800.00. Bertha-Consumers Company became insolvent and this stock became worthless in 1930.
>
> Copy of letter dated March 8, 1932, from the Receivers of Bertha-Consumers Company to Mr. D. B. Heiner, Collector of Internal Revenue, Pittsburgh, Pa., is attached hereto. Deponent reserves the right to file such additional information and evidence as may be needed to fully establish these claims in case the foregoing is not sufficient.

Consideration and action upon this claim was delayed awaiting the outcome of litigation relating to the question of worthlessness, in 1930, of the stock of the American Cuptor Corporation. Subsequently, in 1936, this claim was rejected in part and allowed in the amount of $160.00, which amount was covered by Certificate of Overassessment, on which refund was duly made to plaintiff.

8. On June 29, 1934, plaintiff filed claim for refund in the amount of $6,454.09. On the claim form itself appeared the following statement:

Reporter's Statement of the Case

> This claim is filed as an amendment and amplification of claim for refund filed February 1, 1933. The right to amend claims for refund prior to rejection has been upheld by the Supreme Court in the cases of *Memphis Cotton Oil Co.* (288 U. S. 62), *Factors and Finance Co.* (288 U. S. 89), *Bemis Brothers Bag Co.* (28 U. S. 28), *George Moore Ice Cream Co.* (289 U. S. 373), and in the case of *Youngstown Sheet & Tube Co.*, decided by the Court of Claims June 4, 1934.
>
> The basis of this claim is set forth in the attached statement.

The statement attached to the claim setting forth the basis thereof was as follows:

> This taxpayer erroneously included as a taxable dividend an amount of $36,750.00, received from The M. A. Hanna Company during the year 1930. This amount represents proceeds from sale of new preferred stock issued by The M. A. Hanna Company upon the reorganization of that company in 1930. On the basis of the value of $92 per share assigned on the Estate tax return to the stock exchanged for the new issue in 1930, the basis of the stock sold amounted to $29,338.50. The transaction, therefore, resulted in a profit of $7,411.50 instead of a dividend of $36,750.00.
>
> Giving effect to the above, together with the adjustments claimed in claim for refund filed February 1, 1933, results in a tax liability of $5,926.21 instead of $12,380.30, or an overpayment of $6,454.09, refund of which is herewith requested.
>
> Complete information with respect to the transaction here involved, and which can be furnished in the instant case if necessary, has been filed with and considered by the Bureau during the year 1932, at which time it was determined that the amounts received by stockholders in connection with the transaction did not constitute a taxable dividend.
>
> The right to furnish additional information in substantiation of this claim is respectfully reserved.
>
> A certified copy of letter from the Probate Court showing the appointment of the undersigned as Executrix of the Estate of Matthew Andrews, and that the appointment remains in full force and effect is attached.

The plaintiff was advised by the Commissioner, in a letter dated November 2, 1935, that while "the merits of the claim are allowable", it would be disallowed in full for the reason

that "the facts in the case disclose that the claim filed in June 1934 was wholly unrelated to the claim filed on February 2, 1933, there being an independent demand based upon an entirely different issue. Therefore, it is held that the claim was not filed within the limitations prescribed by law and cannot be allowed." December 16, 1935, the Commissioner of Internal Revenue mailed to the plaintiff an official notice of rejection in full of this claim. The petition in this suit was filed December 12, 1935. The basis of this claim in so far as the merits thereof are concerned, was as follows: Plaintiff had reported the cash received from the sale of the fractional shares of new stock in the Hanna Company as a dividend. The Commissioner of Internal Revenue had ruled the transaction should be treated as a sale of the fractional shares of new stock. The value of the original stock in the hands of the plaintiff to be used as a basis in computing gain or loss on the sale had been determined to be $92.00 per share in the final determination of the estate tax on the estate of Matthew Andrews, deceased. On this basis the fractional shares of stock sold by plaintiff had, in the plaintiff's hands, a value of $29,338.56. The sale price was $36,750.00, resulting in a taxable profit of $7,411.44 instead of a dividend of $36,750.00, and effecting a reduction in plaintiff's tax liability for the year 1930 of $5,536.97.

The court decided that plaintiff was entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

This is a suit to recover an admitted overpayment of income tax for 1930 wherein the Government defends on the ground that such payment can not be made for the reason that a timely claim for refund cannot be amended, after the period for filing a claim has expired, which sets up a new ground for recovery.

Plaintiff duly filed her return for 1930 and paid the tax of $12,800.30 shown due thereon in quarterly installments, the last installment being paid on December 15, 1931. During 1930 plaintiff, pursuant to a recapitalization arrangement, exchanged stock in a corporation in which she was a stockholder for new stock in the same corporation and at

the same time exercised the privilege granted of disposing of fractional shares of new stock for $36,750 in cash. Plaintiff included the entire amount of cash so received in her return for 1930 as a dividend and paid her tax on that basis.

In December 1931 the revenue agent in charge for plaintiff's district advised plaintiff that her return as filed appeared to be correct but that such conclusion was subject to approval by the Commissioner and that in the event subsequent information be received which would materially change her tax it would be necessary to redetermine her tax liability.

In October 1932, following a conference with representatives of the corporation from which the so-called dividend had been received, the Commissioner advised the revenue agent in charge, who had previously indicated his approval of plaintiff's return as filed, that the cash received by its stockholders (including plaintiff) in the recapitalization transaction, heretofore referred to, represented proceeds from the sale of fractional shares of stock and that gains or losses should be computed on such sales instead of having the entire cash reported as dividends, as returned by plaintiff in her return. The result of this change in the treatment of the cash received, in so far as plaintiff was concerned, was that a taxable profit was shown of $7,411.44 instead of a taxable dividend of $36,750, and a reduction in her tax liability for 1930 of $5,536.97.

Subsequent thereto, namely, February 2, 1933, which was within the two-year period for filing claims on account of the tax paid in 1931 for 1930, plaintiff filed a claim for refund of $995.52 for 1930 and assigned as grounds therefor that certain losses (unrelated to the dividend item referred to above) had been sustained in that year for which deductions had not been claimed in her return.

After the statute had run on filing a new claim for refund, plaintiff on June 29, 1934, filed a claim for refund of $6,454.09 for 1930 and assigned as a basis therefor not only the grounds set out in the claim of February 2, 1933, but also the additional ground that refund should be allowed on account of the change in the treatment of the cash received in the recapitalization transaction heretofore re-

ferred to, that is, such cash should not be taxed as a dividend but should be taxed only as profit to the extent that profit was shown from a sale of fractional shares of stock in the manner theretofore determined by the Commissioner. The new claim was styled as an amendment and amplification of the claim filed February 2, 1933, which was still pending before the Commissioner. November 2, 1935, which was likewise before the claim of February 2, 1933, had been acted upon, the Commissioner advised plaintiff that while "the merits of the claim [that filed June 29, 1934] are allowable ", it can not be allowed for the reason that the position of the Bureau was that the claim of February 2, 1933, based on certain grounds could not be amended, after the statute had run on filing new claims, to include items unrelated to those shown in the original claim. The new claim was finally rejected December 16, 1935, and this suit was instituted shortly prior thereto, December 12, 1935. The original claim was not finally acted upon until some time in 1936 when it was allowed in part and rejected in part but no allowance has been made on account of the new item set up in the claim of June 29, 1934.

Our sole question is whether under the circumstances of this case the timely claim for refund, based upon certain grounds, was properly amended after the statute had run on filing a new claim, but prior to action on the original claim, so as to permit recovery on an item not included in the original claim. We are convinced that this case comes within the principle laid down in *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62; *United States* v. *Factor and Finance*, 288 U. S. 89, and *Bemis Brothers Bag Company* v. *United States*, 289 U. S. 28, wherein amendment of a claim was permitted under certain circumstances and that it is not essentially different from that presented in *Youngstown Sheet & Tube Co.* v. *United States*, 79 C. Cls. 683, certiorari denied, 293 U. S. 599, where the right to amend a refund claim was fully discussed and the cases distinguished. We adhere to the opinion therein expressed. See also *Con P. Curran Printing Co.* v. *United States*, No. J–657, decided by this court on June 1, 1936.

In this instance, not only was a timely claim for refund filed on account of certain items, but also prior to the expiration of the time within which a new and independent claim could have been filed, the Commissioner had determined that adjustment should be made of the item which produced the overpayment now in controversy. After the statutory period for filing a new claim had expired, but prior to action on the original claim, plaintiff filed the amendment to the original claim which did nothing more than advise the Commissioner that she was not only demanding the amount shown in the original claim but also that which the Commissioner had long prior thereto and within the statutory period recognized as payable to her. There was therefore no lack of notice within the statutory period that plaintiff was demanding refund on account of the items set out in the original claim and that refund was due plaintiff on account of the item later set up in the amended claim. Action on the claim required a redetermination of plaintiff's entire tax liability, which included a consideration of all items affecting such tax liability in order to determine whether there had been an overpayment of tax. Cf. *Lewis* v. *Reynolds*, 284 U. S. 281. When the Commissioner came to take final action on the original claim he had before him his own determination, made within the statutory period, that there had been an overpayment on the item here in controversy and an amendment to the claim showing a demand for such overpayment. All the equities are with the plaintiff. It would be immoral and unconscionable not to allow an amendment under these circumstances, and especially where an admitted overpayment of taxes is clearly shown and the Commissioner had knowledge of the overpayment prior to the expiration of the statutory period.

Judgment will accordingly be entered for plaintiff for $5,536.97 with interest as provided by law. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

FARMERS COTTON OIL COMPANY TO THE USE OF CHOCTAW COTTON OIL COMPANY v. THE UNITED STATES

[No. 17501, Congressional. Decided February 8, 1937]

On the Proofs

Congressional reference; statute of limitations.—The reference of a claim against the Government to the Court of Claims by one of the Houses of Congress does not stop the running of the statute of limitations against the claim.

Same; jurisdiction under Congressional reference.—It is well settled that while either House of Congress can refer a claim to the Court of Claims for findings of fact, neither House, acting alone, can authorize the court to adjudicate a claim and render a final judgment.

Jurisdiction; statute of limitations; pleading of statute.—The statute of limitations is a jurisdictional matter in the Court of Claims, of which the court is required to take notice whether pleaded or not.

Jurisdiction in Congressional reference; statute of limitations.—Where a claim against the Government of a subject matter which the Court of Claims had jurisdiction to adjudicate was referred to the court by one of the Houses of Congress for findings of fact before the statute of limitations had run against it, and the claimant voluntarily came into the court but did not present the claim to the court by filing a petition until after the statute had run against it, the court is without jurisdiction to adjudicate the claim and render final judgment thereon under the provisions of section 257, title 28 of the U. S. Code (section 151, Judicial Code).

The Reporter's statement of the case:

Messrs. Benet, Shand & McGowan for the plaintiff. *Messrs. George A. King* and *George R. Shields* were on the brief.

Messrs. W. W. Scott and *F. J. Keating*, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The court made special findings of fact as follows:

The plaintiff is one of 285 claimants whose claims are based on similar facts and which have been referred to this

court by a Senate resolution. All of the claimants were corporations or associations engaged in the manufacture of products derived from cottonseed, among which were cottonseed oil and linters. Linters are the short ends of staple cotton which adhere to the seed after the lint is taken off for the manufacture of cloth. They are the best-known basis for nitrocellulose, which is used for the manufacture of high explosives.

In the spring of 1918 and while the World War was in progress, all cottonseed oil mills were placed under the direct control of the Government of the United States through various agencies. The price of linters was fixed at $0.0467 per pound at points of location or production; the mills were required to produce a minimum amount of munition linters per ton of seed crushed, such linters having no value for commercial purposes, and the mills were required to sell all linters produced to the purchasing agents of the United States. Further control was exercised by fixing the price of cottonseed and all the derivative products thereof other than linters; the gross operating cost to the mills; the maximum freight allowance; the profit to be made on each ton of seed crushed during the period from August 1, 1918, to July 31, 1919; and the price per ton to be paid to the farmers for cottonseed. The mills subsequently received and executed a contract of sale which conformed to these requirements and bound the Government to purchase at a specified price from the mills all linters produced during the period above named. This contract contained a cancellation clause giving the Government the option to terminate the contract on certain terms "in the event of the termination of the present war." The contract was not terminated or canceled in accordance with the terms thereof, nor was any settlement ever offered to the mills under its provisions.

On November 11, 1918, hostilities ceased in the Great War and on November 28, of that year, the Government directed the mills to discontinue the manufacture of munition linters and revert to the manufacture of commercial linters. The mills did as directed. On December 30, 1918, the Ordnance Department notified the mills that the Government would take only the linters then held by the various mills,

inspected and tagged, and would take only a part of the linters to be produced between January 1, 1919, and July 31, 1919, this part to be prorated among the mills, and unless the mills accepted this proposition as a settlement within one hour, by 7 p. m. of the same night, the United States would breach the contracts which had been made with the mills and refuse to accept any linters whatever, either theretofore or thereafter produced.

In the case of *Hazelhurst Oil Mill Co.* v. *United States*, 70 C. Cls. 334, being one of the 285 cases referred along with that of plaintiff, the court found that the plaintiff had on hand a certain amount of munition linters which was unsalable for ordinary commercial purposes; also a certain amount of cottonseed for which it had paid the price required by Government regulations, together with a quantity of cottonseed oil, cottonseed meal, and cottonseed hulls. Also that the plaintiff was committed to purchase from its agents cottonseed in a large amount at the price fixed by the Government, that it had large obligations to the banks, and if the Government carried out its threat of breaching the contract the result would have been a crisis in the market of cottonseed and its derivative products and a great and irreparable loss would be inflicted upon plaintiff, and by reason of these circumstances the plaintiff and the other mill companies were induced to sign a settlement contract presented to all of the mills drawn upon terms prescribed by the Government. The case proceeded to judgment and the court found and held that the action of the Government agents amounted to duress and that the mills were not bound by the contract of settlement. For the complete details see the findings and opinion of the case cited which is made part hereof by reference. All of the facts upon which the *Hazelhurst case* was tried are made part of the record herein, so far as they are applicable, by a stipulation between the parties.

The parties have further stipulated that the contract which the plaintiff entered into with the United States known as "Seller's Contract of Sale #3250" provided that plaintiff should produce and sell to the United States approximately 600,000 pounds of linters. A copy of this con-

Reporter's Statement of the Case

tract is attached to the petition herein as Exhibit 7 and is made a part hereof by reference.

During the period from January 1 to July 31, 1919, plaintiff crushed a total of 2,223 tons of seed which at $6.77 per ton of seed crushed (contract price) amounted to $15,049.71.

The Government bought no linters from plaintiff during this period, but plaintiff received for linters sold to other parties $10,176.28.

By reducing its cut of linters after January 1, 1919, plaintiff realized an additional hull production to the extent of 77.805 tons, which at $13.50 per ton amounts to $1,050.36.

The parties further stipulated that the following is a correct statement of the account of plaintiff against defendant upon the basis of the foregoing facts and the application of the stipulation filed in Cong. No. 17,341.

Debit Items Against Defendant

2,223 tons of seed @$6.77 per ton	$15, 049. 71	
Total		$15, 049. 71

Credit Items Allowable to Defendant

Linters sold to the United States	$00, 000. 00	
Linters sold to others	10, 176. 28	
Additional hull credit	1, 050. 36	
Total Credits		$11, 226. 64
Balance		3, 823. 07

The resolution of the Senate referring the claim in suit to this court was passed March 3, 1923, but the petition was not filed until September 9, 1935—more than sixteen years after the claim first accrued and more than twelve years after the case was so referred. The stipulation of the parties under which this case comes before the court presents no facts which would excuse this delay.

The court decided that it was without jurisdiction of the claim other than to find and report the facts, with its opinion, to Congress.

GREEN, *Judge*, delivered the opinion of the court:

Plaintiff's petition was filed on September 9, 1935. Senate Bill 4479, which referred to the Court of Claims the case now being considered with many others, was docketed on March 12, 1923, and the claim upon which this action is founded was therefore not presented to this court until more than twelve years after the congressional reference was made.

The plaintiff contends it is entitled to judgment under the general jurisdiction of this court acquired under what is known as the Tucker Act of 1887. The Government, on the other hand, insists that the statute of limitations has run against plaintiff's claim and that the power of the court is limited to finding the facts for the information of Congress. Section 257, Title 28, of the U. S. Code (Judicial Code, Section 151) is as follows:

> *Reference of claims by Congress.*—Whenever any bill, except for a pension, is pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may, for the investigation and determination of facts, refer the same to the Court of Claims, which shall proceed with the same in accordance with such rules as it may adopt and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy, together with such conclusions as shall be sufficient to inform Congress of the nature and character of the demand, either as a claim, legal or equitable, or as a gratuity against the United States, and the amount, if any, legally or equitably due from the United States to the claimant. If it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter, the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, it

> shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and it shall report its proceedings therein to the House of Congress by which the same was referred to said court. (Mar. 3, 1887, c. 359, Sec. 14, 24 Stat. 507; June 25, 1910, c. 409, 36 Stat. 837; Mar. 3, 1911, c. 231, Sec. 151, 36 Stat. 1138.)

The claim having been referred to this court by the Senate, the issue now raised is whether the court should proceed to final judgment thereon or only make such a report to the Senate as is provided for in the statute.

The resolution referring the bill to this court merely had the effect to transmit the bill and the claim to the court for action as otherwise required by law. In *Hartsville Oil Mill* v. *United States*, 271 U. S. 43, 44–45, the rule with reference to jurisdiction is stated as follows:

> The jurisdiction to hear and determine the claim is conferred by Jud. Code sec. 145, and was not enlarged or otherwise affected by the Senate Resolution.

And it is well settled that while either House can refer a claim to this court for findings of fact, neither acting alone can authorize the court to adjudicate a claim and render a final judgment. *Ayres* v. *United States*, 44 C. Cls. 110, 122. The position of the defendant is that as neither House alone can authorize the court to render final judgment and the bill or resolution does not enlarge the jurisdiction of the court, the reference to this court does not stop the running of the statute of limitations. We think this contention is well founded. The subject matter of the claim is one over which the court has general jurisdiction under existing law in section 145 of the Judicial Code (250 U. S. C. A.) giving the court jurisdiction over all claims against the United States upon any contract, express or implied, but section 257 quoted above provides that the court shall proceed to judgment only—

> If it shall appear to the satisfaction of the court upon the facts established, that under existing laws or the provisions of this chapter, the subject matter of the bill is such that it has jurisdiction to render judgment or decree thereon, * * *.

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Opinion of the Court

The provision is not as clear as it might have been made but we think it was not intended that the bill should enlarge the jurisdiction of the court and unless we should hold that it did we have no authority to render judgment upon the claim.

The case of *Post* v. *United States*, 49 C. Cls. 105, sustains this construction of the statute. In that case the court held in substance that the claim set up therein was *res adjudicata* and ordered the findings to be certified to Congress without rendering any judgment.

We have often held that the statute of limitations is a jurisdictional matter in this court, of which the court is obliged to take notice whether pleaded or not. The bill which referred the case to this court did not provide that the case should be tried without reference to the statute on limitations. The case of *Ford* v. *United States*, 116 U. S. 213, was one in which a claim was referred to this court by a resolution of the Senate and the court said (p. 217–218):

> Every claim cognizable by the Court of Claims must be determined with reference to the limitation prescribed for claims of the class to which it belongs, unless Congress, by statute, otherwise directs. The Court of Claims has jurisdiction to hear and determine a claim referred to it by either House of Congress * * *; but unless Congress otherwise prescribes, that reference will not itself entitle the claimant to a judgment, if his claim is not well founded in law, or, when so referred, was barred by limitation. He acquires no new right by the reference, except to demand that his claim be heard and determined by the court, just as would have been done, had it been one of which the court could have taken cognizance by the voluntary suit of the claimant.

This case is not exactly parallel with the one at bar as the claim involved therein was barred by the statute of limitations at the time when the reference was made but we think the principles determined by the Supreme Court apply equally to the instant case.

The decisions upon which plaintiff relies were made in cases where the claim of the plaintiff was referred to a department which had authority to allow or settle it. In our opinion, they do not sustain the contention of plaintiff but

so far as they are applicable are to the contrary. In the case of *United States* v. *Lippitt*, 100 U. S. 663, 668, it was said:

> Where the claim is of such a character that it may be allowed and settled by an executive department, or may, in the discretion of the head of such department, be referred to the Court of Claims for final determination, the filing of the petition should relate back to the date when it was first presented at the department, for allowance and settlement.

Apparently the Supreme Court treated the reference in such cases as merely a continuation of the proceeding before the department. But this case is not one that could be referred to an executive department for allowance and settlement.

In the case of *Balmer* v. *United States*, 26 C. Cls. 82, 86, which was a congressional case transmitted to the court, it was said:

> If the action is brought within the general jurisdiction, the petition must generally be filed within six years from the time when the claim first accrued. There are, indeed, cases where the petition need not literally be filed within six years; cases referred to the court by the head of an Executive Department under the Revised Statutes, Section 1063, * * *. Such cases do not come here by the voluntary act of the claimant, nor necessarily with his consent. * * * as against the operation of the statute the suit is deemed to have been begun, not by the involuntary filing of the petition in the court, but by the voluntary presentation of the claim to the Department. * * * *Where the claimant voluntarily comes into court he must come within the time prescribed by law.* (Italics ours.)

Plaintiff in the instant case voluntarily came into court and as was said in the *Post case*, *supra:*

> The right to a claim clearly prevailed; the remedy had been lost through the omission of claimants to follow the details of existing law respecting its recovery.

In the case at bar the plaintiff lost its remedy by failure to file its petition within the period of limitations.

As above stated, plaintiff comes into this court sixteen years after its cause of action had originated and twelve years after its case had been referred to this court. It presents no reason for this delay and we can find no excuse for it. The findings in the case will be certified to Congress but that is as far as this court can proceed with the case.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

CARL G. ALLGRUNN *v.* THE UNITED STATES

[No. 34696. Decided February 8, 1937]

On the Proofs

Infringement of patent for ordnance rifling tool. On accounting, or Government use and compensation therefor. (Decision on validity and infringement, 67 C. Cls. 1.)

The Reporter's statement of the case:

Mr. Frank Keiper and *Mr. C. B. Des Jardins* for the plaintiff. *Mr. Francis P. Keiper* was on the briefs.

Mr. Alexander Holtzoff, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. C. Hugh Duffy* was on the brief.

This case was decided on the questions of validity and infringement of the plaintiff's patent on December 3, 1928, on which date the court filed special findings of fact and its opinion holding the patent valid and to have been infringed by the Government, and remanded the case for proof as to the compensation due plaintiff on account thereof. (67 C. Cls. 1.)

The court, upon the entire record, now amends the original special findings of fact by adding thereto the following findings.

XXIII. The plaintiff's patent is valid, and was infringed by the Government in the way and manner stated in the preceding findings of fact.

XXIV. The reasonable and entire compensation for the infringement complained of is the sum of $56,-

043.76 with interest thereon at the rate of six per cent per annum from July 1, 1919, until paid.

Upon the whole case, the court decided that the plaintiff was entitled to recover the sum of $56,043.76 with interest thereon at the rate of six per cent per annum from July 1, 1919, until paid, and entered judgment accordingly.

A. ROY KNABENSHUE v. THE UNITED STATES

[No. K–22. Decided March 1, 1937]

On the Proofs

Infringement of patent for tent; validity and infringement of patent.—Plaintiff's patent No. 858875 for a "new and improved tent" held invalid for lack of novelty and invention, and not infringed by the Government.

Invention; change in placement of element of old device.—A change in the placement of an element of an old device to a new place which does not alter the functioning of the device does not involve invention.

Same.—The mechanical difference between supporting the top cover and sides of a canvas tent by center poles without resorting to a block and tackle, and doing precisely the same thing by attaching to poles a block or blocks and tackle, a well known mechanical device, is so slight as to negative the exercise of invention.

The Reporter's statement of the case:

Mr. Daniel L. Morris for the plaintiff. *Messrs. John F. Neary, Ellwood W. Kemp, jr.*, and *Rene Wormser* were on the brief.

Mr. H. L. Godfrey, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Messrs. J. F. Mothershead* and *J. Y. Houghton* were on the brief.

This case having been heard by the Court of Claims upon a special act of Congress, approved May 3, 1928 (45 Stat. 1734)—

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon

Reporter's Statement of the Case

> the Court of Claims and/or the district court of the United States, notwithstanding the lapse of time or the statute of limitations, to hear, examine, adjudicate, and render judgment of the claim of A. Roy Knabenshue, for the use and manufacture by or for the United States without license of the owner thereof or lawful right, and infringement thereof of patent described in or covered by Letters Patent Numbered 858875, issued by the Patent Office of the United States on the 2d day of July, 1907. From any decision in any suit prosecuted under the authority of this Act an appeal may be taken by either party as is provided for by law in other cases,

and the report of a Commissioner, the court makes the following

SPECIAL FINDINGS OF FACT

1. The plaintiff in this case, A. Roy Knabenshue, is now and has at all times been the sole owner of the entire title, right, and interest, in and to the patent in suit.

2. Knabenshue, while giving exhibition flights with a dirigible airship at Chutes Park, Los Angeles, California, in February 1905, conceived and disclosed to others a drawing or sketch of a portable tent or a hangar for housing a dirigible. The conception as illustrated by the sketch comprised a canvas cover or tent with a series of pairs of supporting poles arranged longitudinally on each side of the tent cover on opposite sides thereof and located entirely outside of the tent cover.

The poles were arranged in transverse pairs with cables or ropes extended between the upper ends of the poles of each pair. Block and tackle, supported from the middle point of each cable and attached to the ridge or peak of the tent cover, functioned to lift and support the ridge or peak of the tent, and thus provide a tent with an interior space free from poles, in which space a dirigible could be housed.

3. In June 1905, the plaintiff had Hettrick Brothers, of Toledo, Ohio, construct a tent hangar for him in accordance with the construction referred to in finding 2. This tent hangar was erected and used on the Tri-State Fair Grounds in Toledo the latter part of June 1905.

Shortly after July 4, 1905, this tent was blown down and destroyed by a windstorm.

4. Immediately following the destruction of Knabenshue's tent hangar in the early part of July 1905, an order was placed with the Hettrick Brothers for a second tent which required about a week to build, and was completed and erected by approximately July 15, 1905. This second tent was substantially similar in form and arrangement to the first tent, with the exception that in this form of tent the series of pairs of spaced supporting poles, by means of which the ridge or peak of the tent was suspended, were located within the boundary walls of the tent and extended up through holes or bail rings in the tent cover on each side of the ridge, thus contributing to the rigidity and wind resistance of the structure.

The peak or ridge of the tent was supported by block and tackle from the midpoint of cables extending across the tent between each pair of supporting poles and in addition the tent cover was suspended by block and tackle at each pole opening or bail ring. There is no evidence as to the specific manner in which the block and tackle was attached to the bail ring or opening.

This tent, after being erected for the purpose of testing the same, was taken down and stored and shipped to New York about August 1905, where it was then erected on a vacant lot, corner of 62d Street and Central Park West. This tent hangar was publicly used at this location for housing Knabenshue's dirigible airship for a period of approximately two weeks.

Three photographs, plaintiff's exhibits 54, 55, and 56, are illustrative of this tent as used at this time and location, and are by reference made a part of this finding.

After the expiration of this period the tent was shipped to Columbus, Ohio, and used there in connection with Knabenshue's dirigible flights during the first week of September 1905. The same tent hangar was also used in White City, Chicago, Illinois, in the fourth week of September 1905.

This tent was subsequently used in various other locations.

5. During the time the tent described in finding 4 was in use, the plaintiff constructed or had constructed for him and used six or seven similar tents at various state and county fairs and other public celebrations.

6. On January 18, 1907, Knabenshue made application for United States patent for a tent; said application materialized into United States Letters Patent #858,875, July 2, 1907, which patent now forms the basis for the present suit.

Certified copies of the Patent Office file wrapper of the patent in suit, defendant's exhibit 62 and plaintiff's exhibit 1, are by reference made a part of this finding.

7. The patent to Knabenshue #858,875 states that the object of the invention is to provide a new and improved tent, arranged to leave the center portion of the tent wholly unobstructed for the convenient housing of airships and like apparatus or for the use of shows and for other purposes.

This is accomplished by arranging a plurality of double suspension units each consisting of a pair of poles connected at the top by a cable or rod which is adapted to suspend a peak of the tent cover and thus leave the center or interior portion of the tent free from poles. The pairs of poles project up through the tent cover on each side of the ridge, or peak through bail rings located in said top, thus contributing to rigidity of the structure.

The relative arrangement of a pair of supporting poles and the tent cover, supported from the midpoint of the cable or rod extending between them, is shown in Fig. 2 of the drawings of the patent in suit, which is herewith produced:

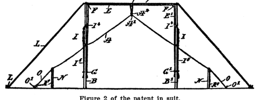


Figure 2 of the patent in suit.

In order to suspend the sides of the tent cover at the point where the poles pass through the bail rings or openings, a block and tackle is attached to each pole. The lower pulley block is attached to a loop the ends of which are fastened to the canvas cover or bail ring on opposite sides of the ring or pole opening. Such construction permits movement of the bail ring along the pole without binding, and thus facilitates erection of the tent. This construction is illustrated in detail in Fig. 4 of the drawings of the patent in suit, which is herewith produced:

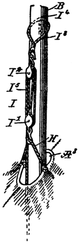


Figure 4 of the patent in suit.

8. The claims of the patent relied upon in the present suit are as follows:

1. A tent comprising a tent cover having a ridge, spaced poles extending through openings on each side

of the ridge of the said tent cover, and means for suspending the ridge and carried by the said poles above the said cover.

2. A tent comprising a tent cover having a ridge, pairs of poles extending through the said tent cover on each side of the ridge, a connection between the upper ends of the poles of a pair of the said suspension poles, and means for suspending the ridge supported by the said connection.

3. A tent comprising a tent cover having a ridge, pairs of poles extending through the said tent cover the members of the pairs being upon opposite sides of the ridge, a connection between the upper ends of the poles of a pair of the said suspension poles, and means for suspending the ridge supported by the said connection, the said suspension device having means for raising and lowering the ridge of the cover.

4. A tent comprising a cover having a ridge, pairs of poles extending through the sides of the cover the members of the pairs being upon opposite sides of the ridge, a cable or rod connecting the upper ends of the poles of a pair of poles with each other, a sheave held on the said cable or rod, ropes passing over the said sheave and connected with the ridge, and guide pulleys on the said posts for guiding the said ropes down the posts.

5. A tent comprising a cover having a ridge, pairs of poles extending through openings of the cover, the members of each pair being arranged upon opposite sides of the ridge, a cable or rod connecting the upper ends of the poles of a pair of poles with each other, a sheave held on the said cable or rod, ropes passing over the said sheave and connected with the ridge, guide pulleys on the said posts for guiding the said ropes down the posts, a loop engaging the tent cover on opposite sides of the said pole openings, and a rope and tackle suspended on each post outside the tent cover and having one pulley block connected with the said loop.

6. A tent comprising a cover having a ridge, pairs of poles extending through openings of the cover, the members of each pair being arranged upon opposite sides of the ridge a cable or rod connecting the upper ends of the poles of a pair of poles with each other, a sheave held on the said cable or rod, ropes passing over the said sheave and connected with the ridge, guide pulleys on the said posts for guiding the said

ropes down the posts, a loop engaging the tent cover on opposite sides of the said pole openings, and a rope and tackle suspended on each post outside the tent cover and having one pulley block connected with the said loop, the tackle ropes and the said ridge suspension ropes passing through the pole openings to the inside of the tent.

9. The form of structure expressed and defined by the phraseology of claims 1 to 4 inclusive of the patent in suit was conceived and reduced to practice by Knabenshue in August 1905.

There is no satisfactory evidence of conception or reduction to practice earlier than January 18, 1907 (the filing date of the patent in suit), of the structure expressed and defined by claims 5 and 6, which claims include and relate to a loop engaging the tent cover on opposite sides of the pole opening or bail ring.

10. In accordance with a contract between the Government and the Scott-Omaha Tent Awning Company, the Government placed an order under date of April 15, 1918, for two canvas balloon hangars, one to be delivered within 30 days after the receipt of the order, and the second, two weeks later.

In accordance with a second contract the Government placed an order with the Scott-Omaha Tent Awning Company under date of June 5, 1918, for five canvas balloon hangars, the same to be ready for inspection at the factory within ten weeks after the receipt of the order.

The specifications referred to in the above orders were directed to a balloon tent hangar having a plurality of double suspension units, each comprising a pair of poles connected at the top by a cable adapted to suspend the peak or ridge of the tent cover from its midpoint by means of block and tackle. The pairs of poles projected up through the tent cover on each side of the ridge through bail rings located in said tent cover, thus leaving the center of the tent free for the housing of an elongated balloon. A loop of chain having its ends connected to opposite sides of each bail ring was provided for connection to a block and tackle to raise said tent cover at this point.

Certified copies of the above-mentioned orders and the contracts relating thereto, plaintiff's exhibits 4 and 5, are by reference made a part of this finding.

There is no satisfactory evidence as to the delivery to the Government of the balloon hangars specified in the above orders, or that these hangars were manufactured either prior or subsequent to July 1, 1918.

11. In 1917–1919, the Government, without the license or consent of plaintiff, used one or more balloon tent hangars in the United States.

These hangars had a plurality of double suspension units, each comprising a pair of poles connected at the top by a cable adapted to suspend the peaks or ridge of the tent cover from its midpoint by means of a block and tackle.

The pairs of poles projected up through the tent cover on each side of the ridge through bail rings located in said tent cover, thus leaving the center of the tent free for the housing of an elongated balloon.

In the hangars used in 1919 a loop of chain was provided at each bail ring for connection to a block and tackle to raise said cover at this point.

The structure used by the Government was substantially similar to the specific embodiment illustrated in the patent in suit and the terminology of the claims in suit is applicable thereto.

12. More than two years prior to the filing date of the Knabenshue patent in suit there were available to those skilled in the art the following patents:

United States patent to Kunkely, #203,279, patented May 7, 1878;

United States patent to Elliott #144,193, patented November 4, 1873;

British patent to Jones, #4520 of 1879;

British patent to Maudslay, #16,824 of 1897;

United States patent to Titus, #385,389, patented July 3, 1888;

United States patent to Stevens, #352,842, patented November 16, 1886;

United States patent to Hickson, #627,932, patented June 27, 1899;

United States patent to Stockman, #92,487, patented July 13, 1869;

United States patent to Hamilton, #379,274, patented March 13, 1888.

United States patents to Kunkely, Elliott, Titus, Stevens, Hickson, and Stockman were considered by the Patent Office during the prosecution of the patent application which matured into the Knabenshue patent in suit.

Copies of these patents, defendant's exhibits numbers 25, 11, 24, 13, 63, 64, 65, 66, and 12, are by reference made a part of this finding.

13. United States patent to Kunkely #203,279 discloses a tent of oblong form comprising two end portions and a mid-portion forming a canvas top, which portions may be fastened together.

The patent also discloses two main tent poles extending upwardly through bail rings in the top of the tent in alinement with and through the ridge thereof. There is no disclosure in this patent as to the specific manner of connecting the lifting ropes to the bail rings. This patent does not disclose or suggest spaced poles extended through openings on either side of the ridge or does it disclose means for suspending the ridge from spaced poles extended upward through the tent cover on either side of the ridge.

14. United States patent to Elliott #144,193 relates to a carriage cover for use in the carriage-apartment of a stable and adapted to be suspended by ropes and pulleys from the ceiling of the room. The top of the cover is a rigid frame. The structure herein disclosed is entirely remote from the disclosure of the patent in suit, and does not suggest to the man skilled in the art the structure specified by the claims of the patent in suit.

15. British patent to Jones #4520 of 1879 is a disclosure relating to the construction and arrangement of a hay rick cover. The cover is constructed of a framing of angle iron, the said framing being covered by preference with corrugated sheets of galvanized iron. A vertical guide rod is located at each of the four corners of the cover, these rods being connected together with each other at the top by means of cross rods, thus forming a rigid rectangular

frame from which the rigid hay rick cover is suspended. The disclosure of this patent does not suggest to those skilled in the art the tent construction disclosed and claimed in the patent in suit.

16. British patent to Maudslay #16,824 of 1897 relates to round or square poleless tents in which the entire tent is suspended from a central point.

In the majority of instances the various illustrated embodiments relate to a tent suspended at a single point from an inclined pole which is substantially the equivalent of the boom of a derrick. The description given on pp. 10 and 11 and illustration, Fig. 9, relate to a square tent having a pole located outside of the tent at each of the four corners thereof, cross cables in the form of an X, connecting the tops of the diagonally opposite poles, and the center of the tent is suspended from the center point at which the cables cross. All of the suspension poles are located entirely outside of the tent cover and this patent does not disclose any pole or pairs of spaced poles extending up through the tent cover.

17. United States patent to Titus #385,389 discloses a device for fumigating trees, and comprises a square rectangular frame from the center of which a canvas cover may be temporarily placed over the tree to be fumigated. There is no suggestion in this disclosure of any pole or pairs of spaced poles extending up through the tent cover.

18. United States patent to Hickson #627,932 discloses a tent supported or hung from a main ridge pole, which is in turn mounted upon two uprights, one at each end.

The ridge of the canvas tent cover is in alinement with and underneath the ridge pole from which it is suspended by a plurality of spaced loops along the ridge.

The patent suggests that a rope may be substituted for the ridge pole.

This patent does not suggest the structure specified by the claims of the patent in suit.

19. James J. Laundergan and Frank L. Gullingsrud were engaged in the show and theatrical business in Duluth, Minnesota. Early in 1902 they decided to establish a tent show under the name of Moon Brothers. For the purposes

of this show they desired an elongated tent with the stage placed at one end thereof and without the usual conventional center pole in front of the stage.

Laundergan designed the form of tent desired and the Baker & Lockwood Manufacturing Company of Kansas City, Missouri, constructed and furnished the same to Moon Brothers. This tent was delivered to Moon Brothers and erected and commercially used by them in Duluth in July 1902.

20. The Moon Brothers' theatrical tent referred to in finding 19 was a tent of conventional form so far as it was provided with side walls and a top sloping downwardly from a ridge or peak. The peak of the tent was supported at the end remote from the stage by a conventional center pole. At the stage end of the tent a pair of alined poles was erected, one at each end or corner of the stage, each pole extending up through a bail ring or opening located in the tent top. A cable connected the upper ends of the poles with each other, and at the stage end the peak or ridge of the tent was supported by block and tackle from the midpoint of the cable extending between the tops of the spaced supporting poles. In addition the tent cover was suspended by block and tackle at each opening or bail ring. There is no satisfactory evidence as to the specific manner in which this block and tackle was attached to the bail ring.

Moon Brothers made commercial use of this same tent in the summer of 1903, with the exception that a new top was furnished to them by Baker & Lockwood due to the fact that the original top was destroyed through extraneous circumstances; the new top was identical in form and construction with the old one.

21. Two small photographs of the exterior of this tent were taken in 1902, and true enlarged photographic reproductions of these photographs made by the conventional photographic enlarging process are in evidence as defendant's exhibits 48 and 50, and are by reference made a part of this finding. These reproductions disclose and are illustrative of the tent construction described in finding 20.

The original small photographs from which these enlargements were made, defendant's exhibits 40 and 45, which are by reference made a part of this finding, inadvertently became damaged subsequent to the making of the enlargements and subsequent to the filing in the Clerk's Office of the Court of Claims as a part of the record after having been received in evidence.

22. During the summers of 1902 and 1903, Moon Brothers frequently advertised their tent show in the Duluth Evening Herald, a daily paper.

In the issue of Saturday, June 6, 1903, the Duluth Evening Herald published a picture of an inside view of Moon Brothers' theatrical tent. This picture was taken from the stage looking toward the audience space and shows the absence of a center pole in front of the stage.

A photostatic copy of this illustration, defendant's exhibit 44A, is by reference made a part of this finding.

23. Claim 1 of the patent in suit reads as follows:

> A tent comprising a tent cover having a ridge, spaced poles extending through openings on each side of the ridge of the said tent cover, and means for suspending the ridge and carried by the said poles above the said cover.

This phraseology accurately reads upon and defines the construction of the Moon Brothers' tent used in 1902 and 1903 in which a pair of spaced poles was located adjacent the ends of the stage and extended through bail rings or openings on either side of the ridge, which ridge was suspended by a cable or rope extending between the pole tops.

24. Claims 2, 3, and 4 of the patent in suit are distinguished from Claim 1, only in that they are directed to a multiplication or duplication of the pairs of supporting poles, which duplication does not possess or suggest any new function over that inherent in the construction expressed by the phraseology of Claim 1 which is directed to a single pair of supporting poles.

In addition Claim 4 includes arrangements of pulleys and ropes so that the suspension ropes may be guided down the supporting poles.

25. The phraseology of Claims 5 and 6 is substantially similar to that of Claims 2, 3, and 4 with the exception that they include as an additional feature "a loop engaging the tent cover on opposite sides of pole openings", the function of which is to prevent the bail ring and the tent cover from binding on the supporting pole as it is raised, which would occur if the hoisting rope were connected to one side only of the bail ring or opening.

None of the prior art patents or publications disclose this loop connection and the evidence does not satisfactorily establish its use in the prior art structures.

26. It was the custom of the Baker & Lockwood Manufacturing Company of Kansas City to print and to issue annual catalogues of tents, tent supplies, awnings, et cetera. These were distributed in the springtime. Fifty to one hundred thousand of these catalogues were annually issued to the trade, lists being obtained from commercial agencies and Dun and Bradstreet.

27. In the annual catalogue issued by Baker & Lockwood Manufacturing Company in the spring of 1906 there is illustrated on page 67 a "Theatrical Tent." The two photographs on this page, a copy of which is in evidence as plaintiff's exhibit 24, contained the following legends:

> Theatrical Tent. 60 feet. Round Top, with 30- and 40-foot Middles. Constructed with two masts one end with rope between at top to hang block on to raise peak.
> Inside view of above Tent, showing stage unobstructed by mast. An excellent arrangement for stage shows.

The tent disclosed in this trade publication is a tent of substantially conventional form having two center poles, one at the center of the tent and the other at the end remote from the stage. The illustrations in the catalogue disclose that at the stage end of the tent a pair of alined poles was provided, one at each corner of the stage, each pole extending up through the top of the tent. A rope or cable connected the upper ends of these two poles with each other, and at the stage end the peak or ridge of the tent was supported from the midpoint of this cable.

The upper illustration on page 67 discloses the exterior of the tent, and the bottom illustration discloses the interior thereof.

In the December 2, 1905, edition of the publication entitled "The Billboard", a theatrical weekly, page 23 carried an illustrated advertisement of the Baker & Lockwood Manufacturing Company. The top illustration on this page was identical with the bottom illustration on page 67 of the Baker & Lockwood catalogue of 1906. A photostatic copy of page 23 of "The Billboard", defendant's exhibit 37, is by reference made a part of this finding.

28. The illustrations in the Baker & Lockwood Manufacturing Company's 1906 catalogue and in the publication "The Billboard" were made from photographs of a dramatic or theatrical tent manufactured by the Baker & Lockwood Manufacturing Company and sold to Thomas Franklin Nye, a showman, sometime during the year 1905 and prior to December 2, 1905.

There is no satisfactory evidence as to when and where these photographs were taken or when the tent was completed and delivered to Nye, or when and where he first erected and used the tent.

29. One of the customers of Baker & Lockwood Manufacturing Company was a Dr. J. T. R. Clark, who conducted a medicine show under a tent. Dr. Clark traveled around the country, accompanied by a troupe of entertainers and physicians, from about 1898 until 1902 or 1903, giving shows at various localities.

There is no satisfactory evidence that Dr. Clark ever possessed or used a tent without a center pole located in the immediate proximity of the center of the stage and in a position where it obstructed said stage.

30. Leo Stevens, an aeronautical engineer, operated a tent, awning, and balloon factory in New York City. In 1901 Stevens designed a tent without center poles for the housing of dirigible balloons and built a small model in accordance with his design. This model was kept in his factory on a table back of a partition and in a place not open to public inspection.

At the time Stevens conceived of this design and built the model he made a sketch or sketches of the same, but none of the original sketches or the model itself have been produced.

Stevens never reduced his conception to practice by building or attempting to build an actual tent such as would be necessary to test for structural rigidity and wind resistance.

There is no satisfactory evidence that Stevens ever disclosed his conception to Knabenshue.

31. During the winters of 1905 and 1906 the "Aerial Club of America" and the "Automobile Club of America" held an exhibition at the Armory in New York City. There was exhibited at this exhibition a model aerodrome tent, which tent is illustrated in the publication entitled "The Motor Way", issue of January 8, 1906, and in the publication entitled "The Automobile", issue of January 25, 1906. It is also shown in a photograph taken of this tent in the Armory during the exhibition.

Photostatic copies of the pertinent portions of the publications "The Motor Way" and "The Automobile", defendant's exhibits 26 and 28, and the photograph, defendant's exhibit 30, are by reference made a part of this finding.

32. The model tent referred to in the previous finding and as disclosed in the illustrations comprised a tent having the peak or ridge thereof supported by block and tackle from the midpoint of cables extending across the tent between pairs of supporting poles. These supporting poles were located in two parallel rows positioned about midway between the peak and eave of the tent cover.

33. The court finds that plaintiff's patent is invalid and that it has not been infringed by the United States.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the court:

The plaintiff, Roy Knabenshue, sues to recover damages for an alleged infringement of his patent #858,875 granted July 2, 1907. The plaintiff's action having been commenced on January 21, 1929, would have been barred under Section 156 of the Judicial Code. The Congress, however, by an

act approved May 3, 1928, conferred jurisdiction upon the court to adjudicate the case irrespective of the statute of limitations. This special act appears in the preamble to the findings. No jurisdictional issue is raised and we need not set it forth again.

Plaintiff in his specifications states that he has "invented a new and improved tent." The object of the invention is to eliminate center supporting poles which function in part to support the top of a tent and thereby leave the center portion "wholly unobstructed" and available as a hangar for airships, etc., as well as for use of stage or other shows.

Canvas tents are admittedly very old. The usual form of construction was to support the middle ridge of the top cover with so-called center poles which elevated it to a considerable distance above the side ridges to form a structure of slanting character capable of excluding rain and sunshine as well as adding rigidity to the same. The means of accomplishing such a structure were old and well known in the art many years prior to 1929.

The plaintiff, engaged in ambulatory exhibition flights with a dirigible airship, desired a portable hangar for the same, and the presence of center poles in customary tents not so used necessitated their removal. They manifestly precluded the use of a small tent for hangar purposes; an unobstructed central portion was essential.

Plaintiff substituted for the usual center poles unit two upright poles, disposed opposite each other and connected at their top ends by means of a cable or rope. Each pole extended through openings provided in the tent for the purpose of permitting the pair of poles to extend above the central ridge of the top of the tent when the same was made ready for use. The use of one or more units of the devised supporting device is dependent upon the size of the tent.

In the center of the cross cable or rope a block and tackle is suspended and attached at this point to the top canvas of the tent and operated by suitable ropes guided in position by a pulley attached to each pole and extending downwardly along the poles to a fixed point near the ground.

By operating the block and tackle the central ridge of the tent was brought into the peak positions indicated in Fig. 2, Finding 7, by the letters D, A^2, and A^1.

At a fixed point somewhat below the top of each of two supporting poles a second block and tackle is attached, intended to support the sides of the tent where the poles pass through it. The letter I in Fig. 2 illustrates the position and functioning of the above element of the patent. Novelty is also claimed for this connection of the block and tackle with the tent. Letters H and A^3, Fig. 4, illustrate the same. The illustration discloses that the lower pulley block I^1 is attached to a loop of rope, the ends of which are fastened to the canvas cover or bail ring on opposite sides of the ring or pole opening A^3.

Invention is said to be involved in this form of construction in that it avoids the possibility of any binding tendency around the opening in the canvas and thereby facilitates the erection of the tent. It is of course conceded that the form of construction disclosed in the specifications and patent claims does eliminate the necessity of using center poles to support the central ridge of a tent and results in an unobstructed central portion of the same.

The distinction between the exercise of mechanical skill and invention has been pointed out too frequently to be repeated. It is manifest from the specifications and claims of the patent in suit that every element of the same is old in the art. The mechanical difference between supporting the top cover and sides of a canvas tent by center poles without resorting to a block and tackle and doing precisely the same thing by attaching to poles a block or blocks and tackle, a well known mechanical device, is, we think, so obviously slight as to negative the exercise of invention.

Plaintiff's patent does not in any respect alter the existing contour of canvas tents. It is true that the position and arrangement of supporting tent poles and means for erecting and lowering the tent take on in some degree a change from the customary modes, but it is seemingly a change in mode only, one that would suggest itself to those skilled in the art who desired an unobstructed interior of the tent.

What the patent discloses is a change in the location of the old elements long used and available in tent construction, so as to supply a supporting structure that will support the canvas of the tent in a way suitable for a particular use of the same.

The removal of the long practiced system of utilizing center poles to support the canvas of circus and other tents where an unobstructed central portion thereof was not essential, by the adoption of a pole system predicated upon the application of support from different angles and by well known means, does not, we think, introduce into the art a distinctly new or improved tent. The old tent in its old form prevails. The plaintiff's concept continues it, changing by relocation the same elements which have always served to support the structure.

In the case of *Redgrave* v. *Singer, et al.*, 120 Fed. 306, 307, a case cited in defendant's brief, the court approved the opinion of the examiners in chief of the Patent Office denying validity of plaintiff's patent. It was held that a change in the placement of an element of an old device to a new place which fails to alter the functioning of the old device does not involve invention. The language of the examiners' opinion is apropos:

> There are some advantages which are incident to the use of the handle in the new place, such as its increased strength because of its shortness, the power being applied nearer to the block; and the countersinking of the handle protects it from blows, and enables closer packing of several boards together for transport. These are all advantages resulting solely from rearrangement, without any change or advantage in the functions of the apparatus for its purpose. Mere location of an old element of an old device in one or another position in the device, without change of function, has long been held to be entirely within the province of the skilled workman, and we see no reason why this change is a new invention.

In the case of the *Essex Razor Blade Corp.* v. *Gillette Safety Razor Co.*, 299 U. S. 94, 98, the Supreme Court in the opinion said:

> As already suggested, every safety razor consisting of a combination of guard, cap, blade, and clamping

> means must also provide means to keep the blade in position relative to the cap and guard. The means adopted have been various. Gillette resorted to the device of square rods or round pins fixed either to the guard or to the cap and slots or holes in the blade and the other member through which the rods or pins should pass to fix the blade in position. Gaisman fixed the blade relative to the guard by one set of lugs and slots and fixed it in relation to the cap by another set of lugs and slots. The choice was one between alternative means obvious to any mechanic; it did not have the quality of invention.

In addition to what has been said, it is established as a fact that at least as early as July 1902 a traveling troupe of players giving shows in a tent, under the name of Moon Brothers, had constructed for them a tent embodying the elements of plaintiff's patent, and it was commercially used by them in more than one locality in the United States.

The Moon Brothers' tent exacted an unobstructed central portion to enable the erection of a stage upon which performances were given, and afford seating arrangements for audiences. It is true that to accomplish the purpose required but one double suspension unit instead of a multiple of the same in case of a larger canvas, but the suspension unit used was similar in point of fact to plaintiff's. Findings 19, 20, 21, and 22 are sustained by the record. In *Slawson* v. *Grand Street Railroad Co.*, 107 U. S. 649, 654, the court said:

> What is covered by the patent is simply the making of an aperture in the top of the fare-box and turning the rays of the head-lamp through it into the box by means of a reflector. In other words, it is the turning of the rays of light to the spot where they are wanted by means of a reflector, and taking away an obstruction to their passage. The facts of general knowledge of which we take judicial notice teach us that devices similar to this are as old as the use of reflectors. Taylor's Ev., sect. 4, note 2; *Brown* v. *Piper*, *ubi supra.* The new application of them does not involve invention.

Plaintiff's petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

GRATON & KNIGHT CO., SUCCESSORS TO GRATON & KNIGHT MANUFACTURING CO. v. THE UNITED STATES

[No. K-542. Decided March 1, 1937]

On the Proofs

Income and profits tax; validity of waiver where Commissioner's name signed thereto under delegated authority.—Where the head of a division of the Bureau of Internal Revenue having consideration of income tax returns was duly authorized to sign the name of the Commissioner of Internal Revenue to waivers by taxpayers, extending the time for assessment or collection, a waiver having the Commissioner's name signed thereto with the initials of such head of division thereunder, not by such head of division but by some employee of his office, under his instructions and direction, and which was approved or adopted by him and duly recorded and acted upon by the Bureau, constituted a valid waiver for the purpose of its execution by the taxpayer.

The Reporter's statement of the case:

Mr. Howe P. Cochran for the plaintiff. *Mr. C. Leo DeOrsey* was on the brief.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. The Graton and Knight Manufacturing Company (hereinafter referred to as the "Manufacturing Company" or, for convenience, as "plaintiff") was a Massachusetts corporation organized January 1, 1872. It was dissolved April 30, 1928, by act of the Massachusetts Legislature. Prior to its dissolution, namely, March 1, 1926, a reorganization was effected under which all of its assets were acquired and its liabilities assumed by The Leather Company, a corporation organized on that date. The name of The Leather Company was changed May 14, 1926, to the Graton and Knight Company, plaintiff herein. Plaintiff brings this action as successor to the Manufacturing Company.

Reporter's Statement of the Case

2. March 29, 1918, plaintiff filed its income and profits tax returns for 1917 showing a tax liability of $84,671.25, which was paid June 13, 1918. September 1920 the Commissioner assessed an additional tax of $57,558.50 against plaintiff for 1917, and November 17, 1920, plaintiff paid $46,-290.44 of such amount, leaving an unpaid balance of $11,268.06. On account of such balance an abatement claim for $9,627.77 was filed November 17, 1920, and at the same time a claim for credit was filed for $1,640.29. As a result of the filing of such claims the collection of such amount ($11,268.06) was stayed. May 16, 1925, the claim in abatement was rejected. July 24, 1925, the collector credited $11,268.06 on account of an overpayment for 1919 against the unpaid assessment for 1917, and such action was approved by the Commissioner August 13, 1925. No action was taken on the claim for credit other than appears in finding 6, where a refund of that amount is shown to have been made for 1917.

3. April 6, 1923, plaintiff executed an unlimited waiver for 1917. Such waiver was not signed by the Commissioner personally but it was signed on his behalf some time subsequent to October 6, 1927, by A. B. Niess, head of Records Division, Income Tax Unit, who was duly authorized to sign such an instrument. February 5, 1924, and January 8, 1925, plaintiff executed additional waivers for 1917 (the latter also including 1914, 1915, and 1916), the first of which purported to extend the statutory period for assessment and collection for one year after the expiration of the statutory period then existing and the second until December 31, 1925, with certain limitations and conditions not here material. The two last-named waivers were likewise not signed by the Commissioner but his signature was placed thereto in the office of L. T. Lohman, who was then head of the Consolidated Returns Division of the Income Tax Unit and duly authorized by the Commissioner to sign such instruments. Lohman did not sign the waivers on behalf of the Commissioner, but the Commissioner's name and Lohman's initials thereunder were placed thereon by employees in Lohman's office and in accordance with oral instructions and directions of Lohman.

Reporter's Statement of the Case

4. May 5, 1925, the Commissioner, by sixty-day letter, advised plaintiff of a final determination of deficiencies as follows:

1914	$713.65
1915	2,647.70
1916	5,533.49
1917	105,574.93

The same letter showed overassessments as follows:

1909	$31.74
1910	72.99
1911	958.17
1912	257.14
1913	236.13

August 1925 the Commissioner assessed the foregoing deficiencies, and August 13, 1925, prepared a schedule of overassessments on which appeared the foregoing overassessments. In conformity with the usual instructions appearing on such a schedule of overassessments the collector applied the overassessments for 1909 to 1913 (which were also found to be overpayments) against the deficiencies for 1914 and 1915. Such credits were equal to the additional tax for 1914 and $842.52 of the additional tax for 1915, leaving a balance in the latter account of $1,805.18, which, together with the additional tax for 1916, was paid November 30, 1925. October 13, 1925, the collector prepared and forwarded to the Commissioner a schedule of refunds and credits which, together with the schedule of overassessments, showed the application of the overpayments for 1909 to 1913 as indicated above, and such schedule was approved by the Commissioner October 28, 1925.

5. The additional assessment of $105,574.93 for 1917 (referred to in finding 4) was paid as follows:

December 17, 1925	$55,309.30
January 9, 1926	7,852.38
March 9, 1926	42,413.25

6. February 4, 1929, plaintiff filed a claim for refund of $163,133.43 for 1917, and assigned the following basis therefor:

> The amount of $57,558.50 was assessed in 1920, but a portion only was collected within five years after the

return for 1917 was filed. (*New York and Albany Lighterage Co.*) The balance of $105,574.93 was not assessed or collected within the statutory period of limitations. (See *New York & Albany Lighterage Co.*, *Joy Floral Co.* v. *Commissioner*, decided by Court of Appeals, District of Columbia, December 3, 1928, and *Benj. Russell* v. *U. S.*, decided by Supreme Court January 2, 1929.)

The taxpayer reserves the right to add new and further reasons why this claim should be allowed. An oral hearing is requested.

September 3, 1929, the Commissioner allowed the claim for, and refunded, $1,640.29 (the amount of the claim for credit referred to in finding 2) to plaintiff, and rejected it for $161,493.14.

The court decided that plaintiff was not entitled to recover.

BOOTH, *Chief Justice*, delivered the opinion of the Court:

The plaintiff, a Massachusetts corporation, sues to recover $105,574.93, with interest thereon, on the grounds that the tax exacted by the Commissioner was assessed and collected at a time when the statute of limitations precluded such action.

The tax involved was an additional assessment for the year 1917. It was assessed in August 1925, and paid in installments on proper dates thereafter. On January 8, 1925, the plaintiff filed a waiver extending the period for the assessment of the tax to December 31, 1925. A refund claim was timely filed and denied by the Commissioner.

The validity of the above waiver is challenged by the plaintiff. The necessity for having the waiver is apparent. Plaintiff sought to establish by oral testimony that the Commissioner did not consent in writing to the waiver, as Section 278 (c) of the Revenue Act of 1924 and the corresponding provision of the Revenue Act of 1926 provide he should do.

The basis for this contention centers upon the signatures placed upon the waiver in the Bureau of Internal Revenue when the same was received for filing. The waiver was not signed individually by the Commissioner. The Commissioner's signature was placed thereon by an employee in

the office of L. T. Lohman, at the time head of the Consolidated Returns Division of the Income Tax Unit. Lohman's authority to sign the Commissioner's name to waivers is not challenged, and Lohman's initials were placed upon the waiver beneath the Commissioner's signature by some employee in his office. This fact is disputed but, we think, established.

In view of the numerous precedents involving the validity of waivers provided for and executed under Section 278 (c) of the Revenue Act of 1924 and similar provisions in other acts, it is apparent that practically every technical question capable of being raised, affecting their validity, has been adjudicated. *Stearns Co.* v. *United States*, 77 C. Cls. 264; 291 U. S. 54; *Riverside and Dan River Cotton Mills* v. *United States*, 81 C. Cls. 610; 296 U. S. 624; *Horuff* v. *United States*, 80 C. Cls. 761; *Eclipse Lawn Mower Co.* v. *United States*, 76 C. Cls. 354; *Florsheim Brothers* v. *United States*, 280 U. S. 453; *Stange* v. *United States*, 282 U. S. 270; *Sabin* v. *United States*, 44 Fed. (2d) 70; *Fleitmann et al.*, v. *Burnet*, 65 Fed. (2d) 176; *Pennsylvania-Dixie Cement Corporation* v. *United States*, *ante*, p. 66.

The plaintiff seeks to segregate the facts in this case from the record of adjudicated cases, and emphasizes a distinction predicated upon the testimony of Lohman, wherein he said that he did not sign the waiver and can not identify anyone in his office who did so. The witness was testifying some five or six years after the transaction and, manifestly, in view of the numerous transactions of a similar character and the volume and character of the work of his office, it is not at all strange that the details of precisely what was done escaped him.

There is no evidence that Lohman did not *consent* to the waiver and there is positive evidence that as head of the division he adopted what was done. The controversy in this case centers upon the signatures appearing upon the waiver, the plaintiff insisting that the testimony of the witness that he did not personally sign the waiver renders it invalid, obviously upon the contention that he did not consent in writing to it. The very fact that the witness testified that he did not personally sign the Commissioner's

name to the waiver, or that he does not recall who did sign, in no way disproves Lohman's consent to the same, for he positively testified that "the letters and the waivers and the communications and the memoranda all came into the office and as we had time we signed them, the girls and myself." In addition to this fact, it appears of record that this waiver was duly recorded, as having been consented to in writing, in a book kept by the head of this division for the purpose of exemplifying waivers which had been consented to in writing.

The case and the statute involved clearly disclose a practical as well as legal administration. The waiver was treated in precisely the same routine procedure long adopted and enforced in the Bureau. It was on the form prescribed by the Bureau and waivers upon such a form were uniformly consented to as a formality. Hundreds of such waivers reached the witness; to sign them individually would have exacted exclusive application to the task and all that was done by the person who did affix the signatures was the mechanical and ministerial act of designating a previous consent which undoubtedly had been given to the same.

What the court said in the *Pennsylvania-Dixie Cement Corporation case* (*supra*) is apropos:

> We think the plaintiff's contentions are entirely without merit. The head of the division in the Bureau which considered the returns for 1914 to 1916 inclusive, had a general authorization to sign the Commissioner's name to waivers. We think it immaterial whether this official personally placed the Commissioner's name on the waivers for those years or had it placed thereon by one of the clerks of his office working under his directions. It could make no earthly difference to the plaintiff or to any one else whether this official personally signed the Commissioner's name to the waiver or whether that act was performed at his direction by a clerk in his office. In substance the act of the clerk was the act of the official himself. The waiver for the years 1914 to 1916 was therefore valid. The same is true as to the waivers for the year 1917 signed on behalf of the Commissioner under the same circumstances.

There is no evidence in this case warranting a finding that what was done in executing the waiver was done without authority, and nothing whatever disclosed which in any way prejudiced plaintiff's rights in the premises. We think Finding 3 is sustained by the record, and the petition will be dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

HETTIE E. KRUG v. THE UNITED STATES

[No. 42900. Decided March 1, 1937]

On the Proofs

Income tax; crediting wife's overpayment on husband's deficiency.—Where, upon individual income-tax returns by a husband and wife, the Commissioner of Internal Revenue duly determined an overpayment by the wife and a deficiency against the husband, which was sustained by the Board of Tax Appeals, the wife's overpayment could not, in the absence of her consent or approval, be credited on the husband's deficiency.

The Reporter's statement of the case:

Mr. Eugene Meacham for the plaintiff.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Robert H. Jackson* for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a citizen of the United States and a resident of Detroit, Michigan. In 1890 she was married to William N. Krug, hereinafter referred to, and since that time they have lived together as husband and wife in Detroit.

2. March 15, 1929, plaintiff filed her individual income tax return for the calendar year 1928 which disclosed a net income of $71,453.51 and a tax liability of $8,481.56.

Shortly thereafter the tax liability so shown was increased by the Commissioner of Internal Revenue to $8,582.58, which was paid as follows:

March 15, 1929	$2,120.39
April 23, 1929	101.02
June 17, 1929	2,120.39
September 16, 1929	2,149.32
December 14, 1929	2,091.46

3. Plaintiff's husband, William N. Krug, filed his individual income tax return for the calendar year 1928 March 15, 1929, disclosing a net income of $72,150.16 and a tax liability of $8,589.26. Shortly thereafter the tax liability so shown was increased by the Commissioner to $8,639.26.

4. The returns of plaintiff and her husband for 1928 were both prepared by the husband and in arriving at the net income disclosed thereby, the husband allocated one-half of the profit derived from the sale of certain securities hereinafter referred to to plaintiff and one-half thereof to himself. The husband drew and signed the checks in payment of the plaintiff's tax for that year, the checks being drawn on a joint account with the National Bank of Commerce of Detroit.

5. February 2, 1931, the Commissioner addressed a communication to plaintiff advising her that, as a result of adjustments made in a report of a revenue agent, her tax for 1928 appeared to have been overassessed $8,399.61, and suggesting that she file a claim for refund therefor. A blank refund-claim form was inclosed for her use. A summary of the changes recommended by the revenue agent read as follows:

Year 1928. Decrease in income, $60,461.16. Overassessment, $8,399.61.

Items changed

Additions:

Item 11:

Interest reported	$25,527.09	
Interest corrected	1,432.90	
		$24,094.19

Interest has been corrected to show only interest paid to brokers on the taxpayer's individual account.

Reporter's Statement of the Case

Items changed—Continued

Additions—Continued.

Item 12:

Taxes reported	$397.41		
Taxes corrected	None.		
		$397.41	

The taxpayer included under this item ½ of taxes paid on property held with her husband as tenants by the entirety. Has been transferred to the husband's return.

Increase in income		24,491.60	

Reductions:

Item 3:

Interest reported	$5,070.18		
Interest corrected	None.		
		5,070.18	

Interest received on property held with husband as tenants by the entirety has been transferred to the husband's return.

Item 6:

Profit reported	$72,457.20		
Profit corrected	11,287.75		
		61,179.45	

Profit corrected includes only profit on the taxpayer's individual transactions through Hutton and Co.

Item 7:

Dividends reported	$19,840.63		
Dividends corrected	1,137.50		
		18,702.13	

Dividends received through Hutton and Co. were found to be as follows:

Penn. R. R.	$87.50		
Rich	500.00		
Int. Comb. Eng	250.00		
Hiram Walker	300.00		
Total	1,137.50		
Decrease in income		84,952.76	
Net decrease in income			$60,461.16

February 20, 1931, plaintiff filed a claim for refund of $8,399.61 for 1928 and assigned the following basis therefor:

"Wm. N. Krug and Mrs. Hettie E. Krug filed separate income tax returns for the calendar year 1928, distributing

equally their combined income. The Department has taken exception to the returns of Mr. and Mrs. Krug, as originally filed and have redistributed the income in such a manner that an additional assessment has been levied on Mr. Krug and a refund will be due Mrs. Krug.

"The Department claimed that joint returns should have been filed rather than separate returns."

6. October 9, 1931, the Commissioner advised William N. Krug of his determination of a deficiency in income tax for 1928 of $13,373.29, which was arrived at by making adjustments in his return corresponding to those described in finding 5 for plaintiff's return. Prior to the issuance of the deficiency notice Mr. Krug had protested to the internal revenue agent in charge at Detroit against a recommendation to a similar effect and plaintiff had filed a similar protest on the same day on account of corresponding adjustments in her tax liability for the same year. (See finding 5.) A further protest dated July 14, 1931, was filed with the Commissioner on behalf of William N. Krug and plaintiff. In these protests the position taken was similar to that set out in the petition to the Board of Tax Appeals, which is referred to below.

December 7, 1931, William N. Krug filed a petition with the United States Board of Tax Appeals for a redetermination of the deficiency for 1928, and in that petition assigned errors as follows:

"(a) The failure of the Commissioner to find that the interest on bank deposits and corporate bonds, which bank deposits and corporate bonds were owned by petitioner and his wife, Hettie E. Krug, as joint tenants for the year 1928, in the sum of $5,070.18, was properly returned as Item No. 3, in the income tax return of Hettie E. Krug, for the year 1928.

"(b) The action of the Commissioner in transferring the interest on bank deposits and corporate bonds jointly held by petitioner and his wife, Hettie E. Krug, in the sum of $5,070.18, from the income of Hettie E. Krug, to the income of petitioner for the year 1928, and charging the same as income of William N. Krug, was erroneous and contrary to the statute in such case made and provided.

"(c) The action of the Commissioner in charging to the petitioner the major portion of the amount of profit on the sale of stocks and bonds owned by petitioner and his wife, Hettie E. Krug, as joint tenants for the year 1928, in the sum of $132,555.01, instead of permitting said profit to be divided equally between petitioner and his wife, Hettie E. Krug, and permitting your petitioner to account for said profit in the sum of $71,921.38 under Item No. 6 of petitioner's return, and permitting Hettie E. Krug to make return on said profit in the sum of $71,921.38 under Item No. 6 of her said return for the year 1928.

"(d) The action of the Commissioner in charging to petitioner an additional sum of $60,633.83 as profit on the sale of stocks and/or bonds for the year 1928, whereas such additional sum was properly chargeable to and properly returned by petitioner's wife, Hettie E. Krug, in her income tax return for the year 1928, under Item No. 6.

"(e) The failure of the Commissioner to permit petitioner to return as profit on the sale of stocks and/or bonds the sum of $71,921.38 only, the same being one-half of the entire profit made by petitioner and his wife, Hettie E. Krug, on the sale of stocks and/or bonds jointly owned by petitioner and his wife, Hettie E. Krug, under Item No. 6 of petitioner's return for said year 1928.

"(f) The action of the Commisisoner in charging to petitioner the major portion of the amount of profit on the sale of stock in domestic corporations for the year 1928, in the sum of $38,828.75, instead of permitting said profit to be divided equally between petitioner and his wife, Hettie E. Krug, and return thereof made in their separate and individual returns for said year 1928 under Item No. 7.

"(g) The action of the Commissioher in charging to petitioner an additional sum of $18,845.62, as profit on the sale of stock in domestic corporations for the year 1928, whereas such additional sum was properly chargeable to and properly returned by petitioner's wife, Hettie E. Krug, in her income tax return for the year 1928, under Item No. 7.

"(h) The failure of the Commissioner to permit petitioner and his wife, Hettie E. Krug, to file separate income tax returns for the year 1928, each accounting for one-half

of the interest on bank deposits and corporate bonds under Item No. 3, of their respective returns, and each accounting for one-half of the profit made on the sale of real estate and/or stocks or bonds under Item No. 6, and permitting each to account for one-half of the dividends on stocks of domestic corporations for the year 1928, under Item No. 7, which interest on real estate and stocks and bonds was jointly owned by petitioner and his wife, Hettie E. Krug.

"(i) The action of the Commissioner in charging to petitioner the major portion of the amount of deductions for the year 1928, in the sum of $49,620.44, under Item No. 11, of petitioner's return, instead of permitting said deductions to be divided equally between petitioner and his wife, Hettie E. Krug, and return thereof made in their separate and individual returns for the year 1928, under Item 11.

"(j) The action of the Commissioner in charging to petitioner an additional sum of $24,093.77, as deduction on interest paid for the year 1928, whereas such additional sum was properly chargeable to and properly returned by petitioner's wife, Hettie E. Krug, in her income tax return for the year 1928, under Item No. 11.

"(k) The failure of the Commissioner to permit petitioner to return, as deductions, one-half of the interest paid in the sum of $25,526.67, the same being one-half of the entire deduction made by petitioner and his wife, Hettie E. Krug, for interest paid on joint liabilities of petitioner and his wife, Hettie E. Krug, for the year 1928.

"(l) The action of the Commissioner in requiring petitioner to pay income tax for the year 1928, in the sum of $22,012.55, instead of permitting petitioner to pay $8,639.26, the same being one-half of the net profit returned by petitioner and his wife, Hettie E. Krug, for the year 1928."

In support of the errors assigned William N. Krug alleged in substance that from and after his marriage to plaintiff in 1890 they (William N. Krug and plaintiff) had acquired and held real estate as tenants by the entireties and personal property as joint tenants; that their bank deposits were made in joint accounts; that certain stock was purchased by them from funds in a joint bank account and considered by them as their joint property; that in

November 1927 they began the purchase of stocks on margin, using jointly owned stock as margin-collateral; that profits and dividends received from trading in the margin account were deposited in their joint bank accounts; that, while the stock transactions were handled through three accounts in their individual names (one in the name of plaintiff and two in the name of William N. Krug), they were at all times considered to be joint transactions, and the money necessary to purchase the stocks was taken from the joint bank accounts, and that it had always been understood and agreed between William N. Krug and plaintiff that the three margin accounts were joint property and that each owned one-half thereof, each being entitled to one-half of the profits and liable for one-half of the losses therein.

The petition concluded with prayers to the Board to require the Commissioner to recognize the joint character of the holdings of William N. Krug and plaintiff, to the end that the deficiency for 1928 against William N. Krug might be determined on the basis that the dividends and profits on such holdings constituted the joint income of these two individuals.

7. The Commissioner duly filed an answer to William N. Krug's petition, which in substance denied the assignments of error and allegations of fact referred to above. Thereafter negotiations were undertaken between William N. Krug and a representative of the Commissioner with respect to an adjustment of Mr. Krug's deficiency for 1928. In connection with these negotiations counsel for Mr. Krug submitted various affidavits from himself and members of his family, which were in accordance with the allegations contained in the petition. Finally, however, after being shown various decisions by the Board of Tax Appeals, the representative of Mr. Krug became convinced that the position taken in the petition was erroneous and that any further attempt to defeat the claim of the Commissioner for the deficiency against Mr. Krug for 1928 would be unavailing. March 24, 1933, the following agreement to stipulate was accordingly signed by Mr. Krug's representative:

"The undersigned petitioner hereby agrees that he will stipulate with the General Counsel for the Bureau of Internal Revenue to the entry of an order by the United States Board of Tax Appeals redetermining his deficiency in the above-entitled case on the following basis of settlement:

"1. That the taxable net income for the year 1928 be determined upon the basis of deficiency notice dated October 9, 1931.

"2. That all other issues be conceded and no new issues raised.

"Subject to the approval of the Commissioner of Internal Revenue, the foregoing adjustments (together with such other adjustments as arise as a proper and necessary incident thereto) are agreed to as a basis for closing the case."

A stipulation was accordingly filed with the Board, which read as follows:

"It is hereby stipulated and agreed by and between the petitioner and the respondent and their respective attorneys of record that there is a deficiency in the Federal income tax liability of the petitioner for the year 1928 of $13,373.29, and the Board may issue an order of redetermination accordingly.

"It is agreed that the said deficiency may be assessed and collected immediately after the issuance of the Board's order of redetermination without regard to the restrictions, if any, contained in the revenue acts of 1926, 1928, and 1932."

April 21, 1933, a decision was entered by the Board, reading as follows:

"Under written stipulation signed by counsel for the parties in the above-entitled proceeding and filed with the Board on April 13, 1933, it is

"ORDERED AND DECIDED: That there is a deficiency in tax for the year 1928 in the amount of $13,373.29."

8. While the petition of William N. Krug was pending before the Board of Tax Appeals, plaintiff likewise filed a petition with the Board asking for a redetermination of the overpayment for 1928 which had been determined by the Commissioner in her favor as shown in finding 5, and in substance making assignments of error and allegations of

fact consistent with those contained in the aforesaid petition of her husband William N. Krug.

January 8, 1932, the Commissioner filed a motion to have the petition dismissed for the reason that a deficiency had not been determined against her, and January 30, 1932, the motion was sustained and the proceeding dismissed for lack of jurisdiction.

9. The additional tax found by the Board against William N. Krug as set out in finding 7, was duly assessed. Notice and demand was made by the collector for its payment, but at that time William N. Krug was in financial difficulties and did not pay the tax. Various efforts, including the placing of liens on property in the name of Mr. Krug, were made to collect the tax but they were unsuccessful and the tax has not been satisfied. While the collector was seeking to collect this tax from William N. Krug, the Commissioner, on May 16, 1933, wrote the following letter to plaintiff:

"Your attention is invited to the action of the Bureau in determining that income for the year 1928 originally taxed on your return is taxable to Wm. N. Krug, resulting in an overassessment in your favor and a deficiency against your husband.

"It is suggested that you authorize the credit of your overassessment to the above-mentioned deficiency. Such action would relieve the deficiency taxpayer of the payment of the additional tax to the extent of the amount of the overassessment in your favor. In the event there is a refund due you after this adjustment has been effected, a Treasury check will be issued in settlement thereof together with allowable interest.

"In the event this adjustment will be satisfactory to you it is requested that you sign the enclosed consent to that action and return it to this office for the attention of IT: C: CC-3-MN."

The inclosure referred to read as follows:

"We, William N. Krug, and Mrs. Hettie E. Krug, husband and wife, of Detroit, State of Michigan, for the year 1928, do hereby authorize the Commissioner of Internal

Revenue to refund, abate, or credit to either of us any income taxes accruing to either or both by reason of any adjustment of income taxes.

(Husband)

(Wife)

"NOTE.—It is necessary that both husband and wife sign the above agreement in order that it be effective."

The foregoing consent was not executed or returned by plaintiff or her husband.

10. August 24, 1933, plaintiff filed a further claim for refund for 1928 in the sum of $8,399.61, alleging the following grounds for the allowance thereof:

"Reference is hereby made to letter of Deputy Commissioner of Internal Revenue, J. C. Wilmer, to the taxpayer, of date February 2nd, 1931, and the revenue agent's report for the year 1928 referred to therein, and both said letter of February 2nd, 1931, and the revenue agent's report are incorporated herein by reference and adoption to the same effect as if they were copied herein in full."

11. July 23, 1934, the Commissioner advised plaintiff as follows:

"Reference is made to your claim for refund in the amount of $8,399.61, income taxes for the taxable year 1928.

"Your claim is based upon the report of the internal revenue agent in charge, Detroit, Michigan, which disclosed an overassessment of $8,399.61, due to the transfer of income in connection with stock transactions, from your return to the return of your husband.

"It is held by this office that a joint venture or partnership relation existed between you and your husband. In accordance therewith, your return has been accepted as filed.

"For the foregoing reasons, your claim will be disallowed. Official notice of the disallowance of your claim will be issued by registered mail in accordance with section 1103 (a) of the Revenue Act of 1932 * * *".

July 26, 1934, plaintiff's representative replied to the foregoing letter protesting the proposed action and, after reciting the previous action of the Bureau with respect to the

tax liability for 1928 of William N. Krug and plaintiff, stated in part:

"From the foregoing, it is obvious that the Bureau in its above mentioned correspondence has taken a clearly inconsistent position. The Board of Tax Appeals has officially determined the matter and its decision is now not subject to appeal.

"Representatives of the Bureau have stated, in informal conferences, that as a matter of administrative policy the Bureau will refuse to make a refund to Mrs. Krug because her husband's tax liability as determined by the Board of Tax Appeals has not been satisfied and paid.

"No one will disagree with the proposition that collection and the determination of the question of to whom income is attributable have in law any relationship.

"It is respectfully urged that the most careful consideration be given to the situation discussed in this letter so that the annoyance, expense, and delay incident to the institution of suit may be eliminated. No one in the Bureau has yet stated to the undersigned any authority in law for the position taken by the Bureau, and it is believed that taxpayers and their representatives are entitled to a disposition of tax cases according to law."

August 13, 1934, the Commissioner reaffirmed the position taken in his letter of July 23, 1934, and September 5, 1934, sent plaintiff a formal notice of disallowances as required by section 1103 (a) of the revenue act of 1932.

12. November 6, 1934, plaintiff's representative wrote the Commissioner calling attention to his letter of February 2, 1931, wherein the Commissioner advised plaintiff of the apparent overassessment of $8,399.61 for 1928 (see finding 5) and requested advice as to whether an overassessment certificate in that amount had been executed in favor of plaintiff. November 12, 1934, counsel for plaintiff wrote the Commissioner asking that the claim be referred to the General Counsel's Office for an opinion.

November 30, 1934, the Commissioner advised plaintiff as follows:

"Reference is made to your letter of November 12, 1934, relative to the income tax case of Mrs. Hettie E. Krug, Detroit, Michigan.

Opinion of the Court

"You request that the claim filed by Mrs. Krug for refund of taxes paid for the year 1928 be reconsidered and referred to the office of the Assistant General Counsel for the Treasury Department for an expression of opinion as to the contention presented.

"You have been advised orally upon other occasions that, in the view taken by this office of your client's case and of all similar cases, a claimant's only possibility of relief lies in litigation. The nature of the question involved leaves no doubt as to the manner of procedure to be adopted.

"Consequently, your request for reconsideration of the claim must be denied."

The court decided that plaintiff was entitled to recover $8,399.61, with interest.

WHALEY, *Judge*, delivered the opinion of the court:

The mere reading of the facts in this case shows beyond even a reasonable doubt that the position of the Commissioner of Internal Revenue in denying a refund to the plaintiff cannot be maintained in any court of law or equity. The arbitrary refusal to make a refund to one spouse merely because collection cannot be made of a deficiency from the other spouse is unlawful and inequitable. The recitation of the facts or the citation of authorities we feel is superfluous. A quotation from the case of *U. S. ex rel Girard Trust Co.* v. *Helvering*, 85 Fed. (2d) 230, is appropriate here:

"When the United States is properly a party in litigation in its own courts it occupies no different or better position than the humblest citizen. Over-reaching on its part should be no more condoned than if practiced by an individual. We have said as much before."

The plaintiff is entitled to recover the amount sued for with interest according to law. It is so ordered.

WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

LITTLETON, *Judge*, dissents.

ALLEGHENY STEEL COMPANY v. THE UNITED STATES

[No. 43053. Decided March 1, 1937]

On the Proofs

Income tax; deductions from income; interest allowed in court decree against taxpayer; when accrued and deductible.—Where, pursuant to a suit in equity instituted in 1929 against the plaintiff corporation by minority holders of the common stock of a corporation merged with plaintiff, for a greater value of their stock than had been allowed in the merger, the plaintiff set up a reserve to meet the contingency of a decision against it, and the court entered its decree in 1931 allowing the stockholders an increased valuation for their stock, together with interest thereon, such interest was contingent, and did not accrue within the meaning of the tax law allowing deductions for interest, until the court's decision or decree, and was therefore not allowable as a deduction from income in plaintiff's tax returns, on the accrual basis, for the years 1929 and 1930.

Deduction for losses or interest.—Losses or interest the accrual of which depends upon the result of a contested action in court are not definitely fixed and deductible from income prior to rendition of judgment in the suit.

The Reporter's statement of the case:

Mr. Clarence E. Frey for the plaintiff. *Mr. George B. Furman* and *Robertson, Furman & Murphy* were on the briefs.

Mr. J. W. Blalock, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a Pennsylvania corporation with its principal office and place of business at Brackenridge, Pa.

2. Plaintiff was engaged in the manufacture and sale of sheet steel and for some 20 years prior to 1929 it had been a direct competitor of the West Penn Steel Company which operated a similar business on adjacent property. In 1929

negotiations were begun by the two companies which culminated in their merger and consolidation. The merger and consolidation were accomplished on the basis of a written agreement entered into April 16, 1929, between the two companies pursuant to resolutions duly adopted by their respective boards of directors. After the agreement had been executed by the officers and directors of the two companies, it was submitted to the stockholders of the respective corporations, who, by a majority vote, ratified it, and on May 6, 1929, the merger became effective, letters patent being isued on that day to the merged company under the name of the Allegheny Steel Company, plaintiff herein. A substantial minority of the stockholders of the West Penn Steel Company did not vote in favor of the merger.

The merger agreement contained the following provision:

> Fifth. The manner of converting the capital stock of each of said corporations into the stock of the Merged Company shall be that upon said merger and consolidation becoming effective as hereinafter provided, the holders of the present outstanding capital stock of the West Penn Company shall surrender their said stock by delivering the certificates therefor, duly endorsed in blank for transfer, or accompanied by suitable instruments of transfer executed in blank, to The Union Trust Company of Pittsburgh, Pittsburgh, Pennsylvania. Each holder of common or preferred stock of the West Penn Company shall be entitled to receive, for each share of common stock so surrendered, seven and one-half (7½) shares of the common stock of the Merged Company, and for each share of preferred stock so surrendered, at his option, either two shares of the common stock of the Merged Company, or one hundred ten dollars ($110) in cash, with interest on said preferred shares at the rate of seven dollars ($7) per share per annum from April 1, 1929, to the date when said stock is so surrendered; provided, however, that no interest shall be paid after a period of thirty (30) days after the merger is approved by the stockholders of the respective companies. Fractional amounts of common stock of the Merged Company, to which any such stockholder of the West Penn Company shall be entitled, to be adjusted in cash at the rate of fifty dollars ($50) per share for such stock of the Merged Company. Each such preferred stockholder of the West

Penn Company who shall not expressly elect to take common stock of the Merged Company, in the manner, and on or before the date hereinabove provided, shall receive cash, at said rate of one hundred ten dollars ($110) with interest as aforesaid, for each share of preferred stock of West Penn Company surrendered * * *.

A minority of the common stockholders of the West Penn Steel Company refused to deliver their stock upon the basis provided in the agreement, and shortly thereafter in 1929 brought a suit in equity to have the value of their stock determined by court decree. A small number of stockholders withdrew, and a somewhat larger number entered, after the suit was started, with the result that at the termination of the suit 2,182 shares were involved. A decree *nisi* was rendered by the court November 22, 1930, requiring that the complaining stockholders be paid $428 for each share of stock held by them with interest thereon at 6 per cent per annum from May 6, 1929. Plaintiff was dissatisfied with the value as fixed by the court, and, after application by plaintiff for a rehearing, a revised and final decree was entered by the court February 19, 1931, which read as follows:

1. That the defendants, Allegheny Steel Company, a corporation, and West Penn Steel Company, a corporation, forthwith pay to the complainants named in the 6th finding of fact the sum of $421 for each of the 2,120 shares of the common capital stock of the West Penn Steel Company owned by them as therein set forth, to wit, the total sum of $892,520.00, together with interest thereon, at the rate of 6% per annum, from May 6th, 1929.

2. That the defendants, Allegheny Steel Company, a corporation, and West Penn Steel Company, a corporation, forthwith pay to Suffolk Securities Company, a corporation, the sum of $421 for each of the 62 shares of the common capital stock of the West Penn Steel Company assigned to said Suffolk Securities Company since the filing of this suit, to wit, the total sum of $26,102, together with interest thereon, at the rate of 6% per annum, from May 6th, 1929.

3. That the defendants, Allegheny Steel Company, a corporation, and West Penn Steel Company, a corporation, pay the costs of this proceeding.

3. After the termination of the suit, namely, March 18 and April 28, 1931, plaintiff paid the minority stockholders on the basis of the court decree set out in finding 2. Included in such payments was interest in the amount of $103,331.62, which is properly allocable to the following periods in the following amounts:

May 6 to December 31, 1929	$36, 355. 16
January 1 to December 31, 1930	55, 521. 48
January 1 to March 18 and April 28, 1931	11, 454. 98
	$103, 331. 62

4. After the suit referred to in findings 2 and 3 had been instituted plaintiff estimated its liability thereunder and expenses connected therewith at $900,000 and set up a reserve on its books at December 31, 1929, in that amount, "Earned Surplus from West Penn Steel Company" being charged with that amount and "Reserve for West Penn Steel Co., Minority Interests" being credited in the same amount. The amount of the reserve was determined by plaintiff on the basis of its estimate of the value of the stock, namely, $375 per share (which was likewise the amount plaintiff had indicated its willingness to pay to dissatisfied stockholders), plus interest to be paid from the date of the merger and plus expenses of the suit.

When the payments were made as shown in finding 3, the reserve account was charged with the amount of such payments which included the interest payment shown in finding 3. The various charges to that account as well as the credits were as follows:

Charges		*Credits*	
Feb. 28, 1930	$700. 00	Dec. 31, 1929	$900, 000. 00
Apr. 16, 1930	93. 75	Mar. 18, 1931	4, 921. 87
Apr. 25, 1930	137. 50	Mar. 18, 1931	117, 679. 59
May 22, 1930	468. 75	Apr. 28, 1931	737. 51
Mar. 18, 1931	1, 021, 201. 46	Apr. 28, 1931	6, 750. 65
Apr. 28, 1931	7, 488. 16		
	$1, 030, 089. 62		$1, 030, 089. 62

Reporter's Statement of the Case

5. Plaintiff duly filed its income tax return for 1929 showing a tax liability of $344,146.06, which was paid in installments as follows:

March 14, 1930	$86,036.52
June 12, 1930	86,036.52
September 9, 1930	86,036.51
December 13, 1930	86,036.51
	$344,146.06

Thereafter the Commissioner assessed an additional tax for 1929 of $3,182.12, which was paid by plaintiff November 25, 1931.

6. Plaintiff duly filed its income tax return for 1930 showing a tax due of $192,771.90, which was paid in installments as follows:

March 13, 1931	$48,192.98
June 13, 1931	48,192.98
September 13, 1931	44,861.70
October 2, 1931	3,331.28
December 13, 1931	48,192.96
	$192,771.90

Thereafter the Commissioner assessed an additional tax for 1930 of $3,261.46, which was paid by plaintiff September 15, 1932.

7. September 3, 1931, plaintiff filed a claim for refund for 1929 of $3,999.07, assigning the following basis therefor:

> On May 6th, 1929, West Penn Steel Company and Allegheny Steel Company were merged. Early in June 1929 holders of 2,198 shares of stock of West Penn Steel Company brought suit for the cash value of their shares. Suit was not brought to trial until June 1930 and decided in November of that year. There was no basis for determining what value would be fixed by the Court and therefore we had no basis for accruing interest during 1929. The interest on the judgment, from which no appeal was taken, amounted to $103,331.62 and was paid in or about March 1931. The interest was figured from the date of the merger, May 6th, 1929, until the date the judgment was satisfied. The amount of interest covering the period from May 6th, 1929, to Jan. 1st, 1930, is $36,355.16, and the tax assessable thereon for 1929 is $3,999.07, which is the amount for which refund is desired.

8. August 28, 1931, plaintiff filed an amended return for 1930 which showed a tax liability of $186,109.33, that is, $6,662.57 less than that shown on the original return. The difference between the original return and the amended return was that in the original return a deduction had not been claimed for the item of interest for 1930 of $55,521.48 referred to in finding 3, whereas that amount was claimed in the amended return.

December 16, 1931, a claim for refund was filed for 1930 of $6,662.57, the difference between the tax liability shown on the original return and that shown on the amended return, and reference was made in that claim to the amended return as a basis for the refund.

9. April 7, 1933, the Commissioner advised plaintiff that the claims referred to in findings 7 and 8 would be disallowed, the letter of rejection reading in part as follows:

> As a result of considering the information submitted in conference of November 8, 1932, the Bureau holds that no liability existed until 1931 when finally decided by the court and there was no principal amount on which interest could be calculated until the court, in its final decree, determined the amount.

The claims were disallowed on a schedule dated June 21, 1933.

10. Plaintiff kept its books and rendered its returns on the accrual basis. No charges were made on its books for the items of interest referred to in finding 3 prior to the termination of the suit in 1931, and likewise no deduction was claimed in the original returns for 1929 and 1930 for the interest items, though claim therefor was made in the timely claims for refund heretofore referred to for 1929 and 1930. With respect to 1931 the parties have stipulated that "Plaintiff was unable to take said interest deduction in 1931 because for the year 1931 plaintiff's income tax return reflected the net loss without the benefit of said interest deduction."

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

Plaintiff brings this suit to recover alleged overpayments of income taxes for the years 1929 and 1930 claiming that

this overpayment resulted from the refusal of defendant's officials to permit proper deductions for interest payments which had accrued in those years.

The facts are not in dispute. It appears that about April 16, 1929, the plaintiff, which is a corporation, entered into an agreement for the merger and consolidation with it of the West Penn Steel Company, another corporation, and through this agreement it succeeded to all of the property rights and franchises of the last named company. The agreement provided that the stockholders of the West Penn Steel Company should receive for each share of common stock in that company seven and one-half shares of the common stock of the plaintiff and be paid for fractional shares at the rate of $50 a share, which had the effect of fixing the valuation for the common stock of the West Penn Steel Company at $375 a share.

A large but minority group of the common stockholders of the West Penn Steel Company refused to accept the terms in the merger agreement, and in July of 1929 instituted suit in equity in a Pennsylvania court to recover payment for the "real value" of their stock. To offset any amount which might be recovered against it in this suit, the plaintiff on December 31, 1929, set up on its books a reserve of $900,000 accompanied by a ledger entry showing that it was intended to cover the amount involved in the suit begun by the minority stockholders and then pending. The amount of this reserve so set up was fixed on the basis of the valuation of $375 a share provided for by the original contract of merger with an additional allowance for interest and expenses of the suit. The action proceeded to judgment and on February 19, 1931, a final decree was entered whereby the plaintiff was ordered to pay to the stockholders bringing suit $421 a share for the shares owned by them together with interest thereon at the rate of six per cent per annum from May 6, 1929. The amount of interest paid by plaintiff under the court decree was $103,331.62 which plaintiff asks be allocated over the period of pendency of the suit as follows:

1929	$36,355.16
1930	55,521.48
1931	11,454.98

Plaintiff paid its taxes for the years 1929 and 1930 without any deduction being allowed on account of such interest. Later it duly filed claims for refund in the respective sums of $3,999.07 for 1929 and $6,662.57 for 1930. The Commissioner rejected these claims and this suit followed.

The ultimate issue in the case is whether the plaintiff is entitled to allocate the payments of interest for 1929 and 1930 as stated above and be allowed a deduction accordingly as for interest which had accrued during the taxable year.

One defense which is set up by defendant is that although the judgment recovered against the plaintiff by the minority stockholders awarded a certain amount which was denominated in the decree as interest, this was not in fact interest in the ordinary meaning of the word but merely a sum granted to the plaintiffs in the suit as compensation for the delay in obtaining their rights. The suit was one in equity in which some of the stockholders of the West Penn Steel Company sought to recover what they claimed was the real value of their common stock in that company which they had lost by the merger. The equity courts of Pennsylvania hold that they have jurisdiction to grant relief in such transactions. *Sauman* v. *Lebanon Valley R. R. Co.*, 30 Penna. 42; *Barnett* v. *Philadelphia Market*, 218 Penna. 649. But the defendant contends that the sum specified as interest forming a part of the total amount awarded by the judgment in favor of the minority stockholders was not in fact interest in the ordinary sense of the term but merely a measure of what would compensate these stockholders for the delay in obtaining the value of their stock and that the situation is similar to cases against the United States in which the plaintiff is found to be entitled to "just compensation", and as a part of this just compensation is awarded interest as an appropriate measure of the amount which will recompense him for the delay in obtaining what is due him. This rule has been applied in many cases, the citation of which is not necessary here as we do not think it is necessary to determine on what basis the Pennsylvania court awarded "interest" to the plaintiffs in the equity

suit for the reason that we consider that the defendant has a good and sufficient defense to plaintiff's suit on another ground.

The defendant also contends that even if it be held that the Pennsylvania court did in fact award the plaintiffs in the equity suit "interest" in the ordinary signification of the term, nevertheless the plaintiff is not entitled to recover for the reason that such interest was neither paid, accrued, nor incurred in the taxable years for which plaintiff seeks to have it allowed as a deduction. The plaintiff, on the other hand, contends that as the liability upon which the judgment was rendered was clearly established and the plaintiff set up a reserve on its books to the amount of $375 a common share plus interest from the date of the merger, the interest accrued as time went on, that the amount thereof was merely a matter of mathematical calculation, and having been subsequently paid it was deductible in the years for which the award was made.

We do not wish to be understood as holding that the plaintiff actually sustained a loss. In obtaining from the majority of the stockholders of the West Penn Steel Company their stock for an equivalent of $375 a share when it in fact, in accordance with the decision of the court, was worth $421 a share, it would seem at first glance as if the plaintiff actually made a very large profit in the transaction; also that when it paid the minority stockholders $421 a share for their stock it paid only what the court adjudicated it was fairly worth and hence lost nothing on the transaction as a whole by reason of the judgment of the court. But the case has been submitted on the assumption that plaintiff did sustain a loss and we think it can be correctly disposed of on that basis.

The plaintiff kept its books and made its income tax returns on an accrual basis and if the interest included in the judgment had actually "accrued" within the meaning of the law during the years it now seeks to have it allowed as a deduction, the contention of the plaintiff must be sustained.

We have been unable to find any decisions made in cases where a question arose as to the deductibility of interest

awarded against the taxpayer as part of a judgment. There are, however, numerous cases in which as we think the same principle is involved. In these cases a judgment was rendered against the taxpayer after a more or less extended litigation upon a cause of action which originated some years prior to the entry of the judgment.

In *Lucas* v. *American Code Co.*, 280 U. S. 445, the taxpayer sought to deduct as a loss from its 1919 gross income the amount for which a judgment was recovered against it in 1922 on a contested liability for breach of contract in 1919, having in that year set up a reserve to meet this contingent liability, but the Supreme Court held this could not be done, and said (p. 450):

> It may be assumed that, since the Company kept its books on the accrual basis, the mere fact that the exact amount of the liability had not been definitely fixed in 1919 would not prevent the deduction, as a loss of that year, of the amount later paid. But here there are other obstacles. Obviously, the mere refusal to perform a contract does not justify the deduction, as a loss, of the anticipated damages. For, even an unquestionable breach does not result in loss if the injured party forgives or refrains from prosecuting his claim. And, when liability is contested, the institution of a suit does not, of itself, create certainty of loss.

And also (p. 452):

> The prudent business man often sets up reserves to cover contingent liabilities. But they are not allowable as deductions. * * * It cannot be said that the loss actually paid by the Company in 1923 was, as a matter of law or of undeniable fact, sustained in 1919.

The doctrine stated in the *Lucas case*, *supra*, has been somewhat extended and amplified. It was applied by this court in the case of *Daniels & Fisher Stores Co.* v. *United States*, 74 C. Cls. 233, where it was sought to deduct as a loss the amount of a judgment upon a claim that had been made against the plaintiff some years previous and it was held that losses which depend on the result of a contested action in court are not definitely fixed prior to the rendition of judgment therein. In the case of *John Thatcher & Son* v. *Commissioner*, 30 B. T. A. 510, it appeared that the tax-

payer held a bond under which he claimed to be entitled to be reimbursed for the default of certain subcontractors. Suit was begun on the bond and was terminated some years later by a judgment against plaintiff which had the effect of establishing a loss for the amount thereof. It was held that plaintiff was entitled to deduct the loss in the year the judgment was rendered.

The cases which we have cited above all pertain to the deduction of losses and the language of the statute upon which they depend necessarily is not the same. The principle, however, has been applied in other instances. The case of *Brown* v. *Helvering*, 291 U. S. 193, involved a question as to the right to deduct certain expenses from gross income in making up a return. It appeared that the plaintiff was a general agent for an insurance company and derived part of his income from a so-called "overriding commission" on the net premiums derived from business written through the local agents. These commissions were subject to deductions on account of subsequent cancellations of business through which they had been received and it appeared that a fair estimate could be made as to the extent the policies would be canceled in future years. The plaintiff's books were kept on an accrual basis and the year's income for overriding commissions was reduced by the estimated amount of the refunds which would have to be made in future years. Plaintiff claimed the right to take this deduction under the statutory provision which allowed a deduction from gross income for the amount of "necessary expenses paid or incurred during the taxable year." The language is not quite the same as is used with reference to deductions for interest, which allows "all interest paid or accrued during the taxable year" but there is no difference in principle, only one of wording. Expenses are "incurred", interest has "accrued." The Supreme Court held in effect in the *Brown case, supra*, that the liability was contingent, as it certainly was in the case now before us, and said:

> Except as otherwise specifically provided by statute, a liability does not accrue as long as it remains contingent.

Syllabus

In the instant case plaintiff's liability in the equity suit commenced against it depended upon a number of matters which entered into the value of the stock of the West Penn Steel Company and was also contingent upon the equity court sustaining the legal contentions of the minority stockholders. Until the case was finally decided, there was no way of ascertaining whether any liability would be established, or if one were established what would be the amount thereof. Where there is a contingency as to whether any award will be made by judgment, necessarily there is a contingency as to whether any interest will be allowed thereon. We think the principle laid down in the cases cited above is applicable to the instant case and hold that the interest which the plaintiff was obliged to pay did not accrue until judgment was entered for it. It follows that plaintiff's petition must be dismissed and it is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

JULIA HENDERSON, PARKER A. HENDERSON, JR., AND A. J. HENDERSON, AS BENEFICIARIES AND DISTRIBUTEES OF THE ESTATE OF PARKER A. HENDERSON, DECEASED, v. THE UNITED STATES

[No. 43183. Decided March 1, 1937. Judgment entered April 5, 1937 [1]]

On the Proofs

Estate tax; tax on interest of decedent's children in his realty in Florida.—The realty of a decedent's estate in the State of Florida is not subject to the payment of administrative expenses of the estate, and the interests of his children in such realty are therefore not subject to Federal estate tax under the provisions of section 302 (a) of the Revenue Act of 1924.

Estate tax on widow's share of husband's realty; whether on dower or otherwise.—Under the laws of the State of Florida the wife's right to dower in the realty of the husband's estate becomes absolute upon his death; and where the wife, subsequent to the husband's death, elected to take under his will,

[1] *Post*, p. 632.

Reporter's Statement of the Case

in lieu of dower, it was her dower interest in the realty which was subject to the Federal estate tax under section 302 (b) of the Revenue Act of 1924, and not the interest taken by her under the will, nor a child's part, of which she had made no election in lieu of dower.

The Reporter's statement of the case:

Mr. William S. Hammers for the plaintiffs.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiffs are all citizens of the United States and residents of the State of Florida, and are all beneficiaries and distributees of the Estate of Parker A. Henderson, deceased.

Parker A. Henderson, a resident of Miami, State of Florida, died testate on July 26, 1925, leaving a last will and testament which was duly probated in the County Judge's Court at Miami, in Dade County, State of Florida, and letters testamentary upon the estate were issued by said Court on August 1, 1925, to First Trust and Savings Bank (name later changed to First Trust Company), a Florida corporation.

Parker A. Henderson left surviving him as the sole beneficiaries and distributees of his estate, Julia Henderson, his widow, and Parker A. Henderson, Jr., and A. J. Henderson, his sons.

2. The estate of decedent has been fully administered and settled, and First Trust Company has been discharged as executor of said estate.

3. During the period of administration of the estate, the executor thereof duly filed a Federal estate tax return for the estate on Form No. 706, listing the assets and liabilities thereof. The Federal estate tax on the estate, as determined and assessed by the Commissioner of Internal Revenue, together with interest thereon, was $40,189.90, which was duly paid by the executor, in various amounts on different dates, the first payment being made on May 16, 1929, and the final payment on December 10, 1932.

4. Included in the Federal estate tax return were certain parcels of real estate situated in the State of Florida, the value of which were determined by the Commissioner of Internal Revenue, for the purpose of the Federal estate tax, at $460,389.99.

5. On June 13, 1932, the executor of the estate filed a claim with the Collector of Internal Revenue at Jacksonville, Florida, on behalf of the estate in which he asked for the refund of $15,793.46 on account of the estate tax paid, and on May 11, 1933, the executor of the estate filed a further or supplemental claim in which he asked for the refund of an additional amount of $14,510.72, upon the ground that there should be excluded from gross estate of Parker A. Henderson, deceased, in the computation of the Federal estate tax, all real property located in the State of Florida. These claims were based upon the decision of the Supreme Court of the United States in *Crooks, Collector of Internal Revenue*, v. *Harrelson et al.*, 282 U. S. 55.

6. Thereafter, upon final audit and review of the estate tax liability, and upon consideration of the claims for refund, the Commissioner of Internal Revenue held and determined that real estate located in the State of Florida should not be included for estate tax purposes, in the determination of the estate tax liability, except to the extent of the interest therein of the widow of the decedent, existing at the time of decedent's death as a child's share under the statutes of the State of Florida. In his final determination of the estate tax liability, the Commissioner excluded from gross estate the sum of $306,926.66 as the value of the real estate which was not taxable, and included in gross estate, in the determination of the tax liability, the sum of $153,-463.33 as the value of the widow's child's part of the real estate, holding that it was taxable under the provisions of Section 302 (b) of the Revenue Act of 1924, in effect at the date of decedent's death on July 26, 1925. Thereupon the Commissioner, under date of December 20, 1933, issued to the executor his certificate of overassessment in the amount of $16,540.73, which amount, together with interest thereon in the sum of $1,243.84, was duly refunded to the executor by check dated January 11, 1934.

Opinion of the Court

7. Julia Henderson, widow of Parker A. Henderson, did not renounce the will of her testate husband, Parker A. Henderson, nor did she elect to take dower or a child's part in the estate of her husband.

8. In his final determination of the estate tax liability the Commissioner erroneously excluded from gross estate the value of certain parcels of jointly owned real estate in the amount of $4,583.33.

The court decided that plaintiffs were entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

The plaintiffs are the beneficiaries and distributees of Parker A. Henderson, a resident of the State of Florida, who died in 1925 leaving his last will and testament which was duly admitted to probate, in which he named his two sons and his widow as sole devisees and legatees. The estate has been fully administered and settled and the executor has been discharged. During the administration of the estate the executor duly filed a Federal estate tax return and paid the Federal estate tax determined to be due thereon. Included in the estate tax return were certain parcels of real estate situated in the State of Florida which the Commissioner determined had a value of $460,-389.99, and upon this valuation the estate tax was paid. Subsequently the executor filed two claims for refund upon the ground that all real property located in the State of Florida should be excluded from gross estate in the computation of the estate tax liability. Upon final consideration of the refund claims, the Commissioner of Internal Revenue excluded from the gross estate the sum of $306,-926.66 as not taxable but included an interest of the widow in the sum of $153,463.33 (being a child's part), as taxable under the provisions of section 302 (b) of the Revenue Act of 1924 and made a refund to the executor of the said estate, in accordance with his decision, together with interest thereon.

The widow of the decedent did not renounce the will nor did she elect to take dower or a child's part in the estate of her husband. This suit is brought for the purpose of

recovering the estate tax alleged to have been overpaid due to the inclusion in gross estate by the Commissioner of Internal Revenue of the value of the widow's interest in the real estate of decedent and which the Commissioner has determined to be a child's share which she might have elected to take in lieu of dower.

Both parties are agreed that the Commissioner was correct in excluding the value of two-thirds of the real estate under the decision of *Crooks* v. *Harrelson et al.*, 282 U. S. 55, which construed subdivision (a) of Section 302 of the Revenue Act of 1924, and which held that real estate of a decedent which was not subject to the payment of administrative expenses could not be included in gross estate for estate tax purposes. And the Commissioner properly held that Florida real estate comes within that category.

The basis of the Commissioner's action is Section 302 (a) and (b) of the Revenue Act of 1924 which reads as follows:

> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;
>
> (b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy.

The present controversy involves the construction of subdivision (b) under which the Commisisoner included the value of one-third of the real estate on the ground that under the Florida laws the widow had a dower interest in such property existing at the time of the decedent's death and under the statutory law of Florida there was created an estate in lieu of dower which gave the surviving spouse a right of election to take a child's part and, therefore, a child's part, which in this case was one-third of the real estate in fee, should be included in the gross estate.

The plaintiffs contend that under the provisions of the decedent's will, under which the widow took, the widow was not "endowed with an interest in the property at the time of decedent's death", that "no dower interest comes into being" under such circumstances and that accordingly no amount should be included in the gross estate on account of the dower interest. This raises the question whether the dower rights of the widow, as provided by the common and statutory laws of Florida, ever took effect where the widow acquiesced in the provisions made for her by the last will of the decedent. Florida is a common law state. Section 71, Revised General Statutes of Florida 1920 (Sec. 87 of Comp. Gen. Laws 1927) and Revised General Statutes of Florida, 1920, Sections 3629, 3630, and 3632, provide as follows:

71. *Common law and certain statutes declared in force.*—The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July 1776, be and the same are hereby declared to be of force in this State: Provided, The said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this State.

SEC. 3629. *Dower in lands provided for.*—When any person shall die intestate, or shall make his last will and testament, and not therein make any express provision for his wife by giving and devising unto her such part or parcel of real and personal estate as shall be fully satisfactory to her, such widow may signify her dissent thereto in the circuit or county judge's court of the county wherein she resides at any time within one year after the probate of such will; and then in that case she will be entitled to dower in the following manner, to-wit: One-third part of all the lands, tenements and hereditaments of which her husband died seized and possessed, or had before conveyed whereof she had not relinquished her right of dower as provided by law, which said third part shall be and enure to her proper use and behoof in and during the term of her natural life. In which said third part shall be comprehended the dwelling house in which her husband shall have been accustomed most generally to dwell next before his death, together with the offices, outhouses,

buildings, and other improvements thereunto belonging or appertaining. If, however, it should appear to the judge of the court to which application is made that the whole of the said dwelling house, outhouses, buildings, and other improvements thereunto appertaining cannot be applied to the use of the widow without manifest injustice to the children or other heirs, then such widow shall be entitled to such part, not less than one-third part, as the court may deem reasonable and just.

SEC. 3630. *Dower in personalty provided for.*—When a husband shall die intestate, or shall make his last will and testament and not make provisions therein for his wife, as expressed in Section 3629, she shall be entitled to a share in the personal estate in the following manner, to-wit: If there be no children, or if there be but one child, she shall be entitled to one-half; but if there be more than one child, she shall be entitled to one-third part in fee simple, and such claim shall have preference over all others, and the said share shall be free from all liability for the debts of the decedent.

SEC. 3632. *The widow's election as to child's part.*—

1. *Provision for.*—In all cases in which the widow of a deceased person shall be entitled to dower, she may elect to take in lieu thereof a child's part.

2. *Time of.*—Such election shall be made within twelve months after the probate of the will or granting letters of administration or she shall be confined to her dower.

3. *Effect of the Election.*—If a widow take dower she shall be entitled only to a life estate in the real property, to return at her death to the estate of her deceased husband for distribution; if she takes a child's part, she shall have in the property set apart to her a fee simple estate in the real property, and an absolute right to the personal property set apart to her, with power to control or dispose of the same by will, deed, or otherwise.

There are other provisions for the release of dower by a married woman by separate deed or a joint deed and the manner in which such acknowledgment shall be taken. The decisions of the courts of Florida show that dower has long been recognized as incident to the marriage relation and attaches upon coverture; that it "is a title inchoate and not consummate until the death of the husband, but it is an

interest which attaches on the land as soon as there is the concurrence of marriage and seizen" (4 Kent 50), and that "A right to dower is an interest contingent during the life of the husband, but rendered absolute by his death." *Smith et al.* v. *Hines*, 10 Fla. 258, 282, 283. In *Rain* v. *Roper*, 15 Fla. 121, 126, it is said: "The widow is entitled to a dower of the lands of which the husband was 'seized and possessed' during coverture, unless his seizen be defeated." In *Herzog* v. *Trust Company of Easton*, 67 Fla. 54, 56, the court says:

> "Under the laws of this state the wife's statutory dower rights in her husband's property are superior to the husband's will, but those statutory dower rights are more liberal to the widow than were the common law dower rights. * * * The statutes [of Florida] do not take away a wife's dower, but make more liberal provisions for dower rights than existed at common law and also give the widow the privilege of election between dower and a child's part. A will can not exclude the widow from her statutory rights in her husband's estate."

It is apparent that, both by the statutes of Florida and the decisions of the courts of that state, the right of dower exists in Florida real estate to the widow of the deceased. Under Section 3629 the right is given to the widow to renounce the will and take a dower interest in lieu of that provided in the will. This provision gives a widow the right of election but in order for her to renounce the will and take a dower interest, or to take under the will and not the dower interest provided by the statute, there must be some action, expressed or implied, on her part. The mere fact that she ultimately takes under the will, rather than statutory dower, does not alter the fact that there existed at the time of the husband's death the right of dower which could be resorted to by the widow at any time within one year after the probate of the will. In the instant case, the decedent made provision for his wife in his will and she has acquiesced in the provision made for her by her deceased husband. This acquiescence is tantamount to an implied election to take under the will as against her statutory dower rights. Nevertheless, in our

opinion, the statutory dower right attached immediately upon the death of the decedent and was only devested when the widow acquiesced in the provisions of the will and thereby exercised the right of election between the will and her statutory dower rights.

It is this dower interest which Section 302 (b) *supra*, seeks to reach and which provides for the inclusion in the gross estate "of any interest therein of the surviving spouse, *existing at the time of the decedent's death as dower*, * * *." [Italics ours.] This dower interest which existed at death, not that arising after death by an election to take under the will or election to take a child's part, is what should be included in gross estate, regardless of what the later election might be. A like conclusion was reached in *Crooks* v. *Loose*, 36 Fed. (2d) 571 and *Scott* v. *Commissioner*, 69 Fed. (2d) 445 (involving Missouri real estate), and *Tait* v. *Safe Deposit & Trust Co.*, 70 Fed. (2d) 70 (involving Maryland real estate). Our attention has been brought by the plaintiff to the case of *Ballard* v. *Helburn*, 9 Fed. Supp. 812, affirmed 85 Fed. (2d) 613. Suffice it to say that this case involves primarily the construction of the laws of Kentucky and only incidentally the laws of Florida. The court based its conclusion on the rule laid down by the Kentucky courts and stated "in the absence of any showing to the contrary, I shall accept it [the Kentucky rule] as the controlling rule in Florida." We are satisfied that, under the statutes and decisions of Florida, a dower interest existed in the decedent's real estate at the time of his death and the value of such interest only should accordingly be included in the gross estate for estate tax purposes. The determination of the Commissioner up to this point was correct but in his decision he went a step further. He included the child's part in lieu of dower. The statutes give the widow the right to make this election and she did not make it and, therefore, a child's part was never involved or included. The right to a child's part did not exist at the time of the decedent's death; it only could come into existence after the exercise by the widow of her right of election which was never made by her. In this connection the observations of the court in *Tait* v. *Safe*

Deposit & Trust Co., *supra*, where a dower interest instead of a child's part was included, are in point:

> In my opinion it was the legislative intent by (b) to tax only the inchoate interest of the surviving spouse which existed during the decedent's life, made consummate by the latter's death; and not the interest created after death by an election to take as heir. This construction is consistent with the true nature of the tax as recently emphasized—that is a death duty, rather than a succession or legacy tax. *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50, 44 S. Ct. 291, 68 L. Ed. 558; *Tyler* v. *United States*, 281 U. S. 497, 502, 50 S. Ct. 356, 74 L. Ed. 991, 69 A. L. R. 758. In Maryland, common-law dower, as still preserved, alone meets this test. In other states where common-law dower has been abolished, the statutory estate in lieu of dower may also meet the test. But it is unreasonable to infer that Congress meant to tax in one state either common-law dower or a larger statutory estate. Any such construction would introduce an uncertainty or ambiguity which under familiar principles affecting taxing statutes would have to be solved in favor of the taxpayer. *Crooks* v. *Harrelson*, 282 U. S. 55, 61, 51 S. Ct. 49, 75 L. Ed. 156; *Gould* v. *Gould*, 245 U. S. 151, 153, 38 S. Ct. 53, 62 L. Ed. 211.

The record establishes the value of a child's part which was included in gross estate by the Commissioner, but it fails to show the smaller interest in the form of dower which should have been included in lieu thereof.

Judgment in favor of plaintiffs will be suspended pending a submission by the parties of the correct value of such interest and the amount of refund to which plaintiffs are entitled by reason of the reduction in the value of the interest in the real estate which is to be included in the gross estate. In determining the amount of the refund consideration should also be given to an item of $4,583.33 which the parties have stipulated was erroneously excluded by the Commissioner from the decedent's gross estate on account of certain parcels of jointly owned real estate.

It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

THE DELAWARE TRIBE OF INDIANS v. THE UNITED STATES

[No. 43396. Decided March 1, 1937]

On Defendant's Motion to Dismiss

Jurisdiction; special jurisdictional act; statute of limitations.—The statute of limitations applies to special jurisdictional acts in precisely the same way as to other grants of jurisdiction to the Court of Claims unless some express words in the acts negative its application or the plaintiffs fall within the exceptions stated in section 156 of the Judicial Code.

Same.—Section 156 of the Judicial Code is not only a statute of limitation but is jurisdictional in character. It may not be waived by the defendant, and it is the duty of the court to enforce it whether the defendant raises the issue or not.

Accrual of claim.—A claim accrues within the meaning of section 156 of the Judicial Code when a suit may first be brought upon it.

Enlargement of special jurisdiction.—It is a long established precedent, from which the court may not depart, that special jurisdictional acts are not to be enlarged by implication or extended beyond the express letter of the grant.

Reenactment of jurisdictional statute by amendment; revival of jurisdiction.—The amendment of a special jurisdictional act in a minor or incidental matter bearing no relation to the jurisdiction or merits of the claims involved in the act, and without express language to show an intent to reenact the statute, did not constitute a reenactment of it, or revive a jurisdiction under it which had lapsed or become barred by the statute of limitations.

The Reporter's statement of the case:

Mr. Charles B. Rogers for the plaintiff. *Mr. Fred B. Woodard* and *Mathews & Trimble* were on the brief.

Mr. Walter C. Shoup, with whom was *Mr. Assistant Attorney General Harry W. Blair*, for the defendant. *Mr. George T. Stormont* was on the brief.

The facts sufficiently appear in the court's opinion.

BOOTH, *Chief Justice*, delivered the opinion of the court:

Defendant's motion to dismiss plaintiffs' petition raises an issue of jurisdiction in this case. The motion is pred-

icated upon the statute of limitations applicable to this court.

The facts are these: February 7, 1925, Congress enacted a special jurisdictional act enabling the plaintiff Indians to bring suit in this court. We cite the same as it appears in 43 Stat. 812:

> That all claims of whatsoever nature the Delaware Tribe of Indians residing in Oklahoma may have or claim to have against the United States may be submitted to the Court of Claims, with right of appeal to the Supreme Court of the United States by either party; and jurisdiction is hereby conferred upon the said Court of Claims and the said Supreme Court of the United States to hear, determine, and enter judgment on any and all such claims. The said courts shall consider all such claims de novo, upon a legal and equitable basis, and without regard to any decision, finding, or settlement heretofore had in respect of any such claims.
>
> If any claim or claims be submitted to said courts, they shall settle the rights therein, both legal and equitable, of each and all parties thereto, notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions. The claim or claims of said Delaware Tribe may be presented separately or jointly by petition, subject, however, to amendment, and the petition shall be verified by the attorney or attorneys employed by such Delaware Tribe under contract approved by the Secretary of the Interior and the Commissioner of Indian Affairs in accordance with sections 2103 to 2105 of the United States Revised Statutes to prosecute their claims under this Act.

The foregoing statute in its last paragraph fixed the fees allowable by the Court to the properly accredited attorney or attorneys for the Indian Tribe. The tribe, considering itself under obligation to Richard C. Adams for past services rendered during his life, wished to compensate therefor by allowing to his estate a fixed percentage of whatever sum it may recover. To accomplish this purpose Congress on March 3, 1927, amended the act of 1925 in the manner following:

Opinion of the Court

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the last paragraph of the Act approved February 7, 1925, entitled "An Act to refer the claims of the Delaware Indians to the Court of Claims, with the right of appeal to the Supreme Court of the United States" (Forty-third Statutes at Large, pages 812 and 813), be, and the same hereby is, amended to read as follows:

"Upon the final determination of any suit the Court of Claims shall decree such fees as may be deemed fair and reasonable for services and expenses rendered and incurred therein, to be paid to the attorney or attorneys, such fees for services not to exceed 10 per centum on the amount of the judgments recovered and in no event to be more than $25,000 in any one claim, and the Court of Claims shall also decree to the estate of Richard C. Adams, deceased member of the Delaware Tribe, and its representative and attorney for many years and up to his death in October, 1921, a reasonable amount for the services and expenses of said Richard C. Adams, rendered and incurred during his lifetime for and on behalf of said Delaware Tribe in connection with its claims against the United States, to the extent of but in no event to exceed 2½ per centum on any sums recovered; and all of such sums so to be paid for services and expenses shall be paid out of any sum or sums found due said Delaware Tribe and not otherwise. Such suit, suits, or causes shall be advanced on the docket of the Court of Claims and by the Supreme Court of the United States if an appeal shall be taken" (44 Stat. 1358).

Five separate suits were begun by the plaintiffs under this special jurisdictional act as amended. Three came to trial and were decided by the court (72 C. Cls. 483; *Id.* 525; 74 C. Cls. 368). The remaining two were voluntarily dismissed on plaintiffs' motion. The petitions in the above cases were timely filed.

June 4, 1936 (49 Stat. 1459), Congress enacted the following act:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the last paragraph, as amended, of the Act entitled "An Act to refer the claims of the Delaware Indians to the Court of Claims, with the right of appeal

to the Supreme Court of the United States", approved February 7, 1925, is amended by striking out the following: "and in no event to be more than $25,000 in any one claim."

The petition in this case was filed on August 3, 1936, more than eleven years after the enactment of the original act of 1925, and more than nine years subsequent to the amendment of the same. Section 156 of the Judicial Code provides as follows:

SEC. 156. Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the Secretary of the Senate or the Clerk of the House of Representatives, as provided by law, within six years after the claim first accrues. * * *

The issue is confined to the one question of law, i. e., does the amendatory act of 1936 "reenact" and, as the plaintiffs put it, "revitalize" the special jurisdictional act of 1925 and thus enable the plaintiffs to escape a plea of the statute of limitations predicated upon Sec. 156 of the Judicial Code.

The statute of limitations applies to special jurisdictional acts in precisely the same way as to other grants of jurisdiction to this court unless some express words in the act negative the application of the same or the plaintiffs fall within the exceptions mentioned in Section 156 of the Judicial Code. *Rice* v. *United States*, 21 C. Cls. 413, 122 U. S. 611; *United States* v. *Greathouse*, 166 U. S. 601; *De Arnaud* v. *United States*, 151 U. S. 483. Section 156 of the Judicial Code is not only a statute of limitation but is jurisdictional in character in this court. *United States* v. *Wardwell*, 172 U. S. 48. It may not be waived by the defendant and it is the duty of the court to enforce it whether the defendant raises the issue or not. *Clark* v. *United States*, 99 U. S. 493; *Kendall* v. *United States*, 14 C. Cls. 122; *Mosby* v. *United States*, 24 C. Cls. 1, 133 U. S. 273; *B. & O. R. R. Co.* v. *United States*, 34 C. Cls. 484.

A claim accrues within the meaning of Section 156 of the Judicial Code from the date when a suit may first be brought upon it. *Louisville Cement Co.* v. *Interstate Com-*

merce Commission, 246 U. S. 638; *Finn* v. *United States*, 123 U. S. 227; *Caudle* v. *United States*, 72 C. Cls. 331. It is clear that when the act of 1936 amending the act of 1925 was passed, the plaintiffs were barred from prosecuting any suit under the act of 1925 as amended in 1927. The law with respect to this fact is well settled.

The enabling clause of the act of 1925 dealing with jurisdiction, the basis of the claims to be filed and limiting as well as designating the defense which may be interposed, was not amended in any respect by any legislation subsequent to 1925. The jurisdiction of the court upon the merits of the controversy remained as originally conferred. All that Congress did in the amendatory legislation was to seek a change in the amount and manner of compensating the attorneys of record and one deceased member of the tribe.

It is a long since established precedent, from which this court may not depart, that special jurisdictional acts are not to be enlarged by implication or extended beyond the express letter of the grant. The remedy of the plaintiffs is purely statutory and is strictly limited to the statute irrespective of extraneous contentions involving equitable and moral considerations for the adjudication of which the statute does not provide. *Schillinger* v. *United States*, 155 U. S. 163; *Blackfeather* v. *United States*, 190 U. S. 368; *Price* v. *United States and Osage Indians*, 174 U. S. 373; *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494.

Plaintiffs' argument is addressed to a contention that the report of the committees of Congress on the amendatory act of 1936 clearly discloses an intention upon its part to reenact the act of 1925. Obviously there are no express words used indicating such an intention. The act imports no apparent ambiguity. The fact that no suits were pending in this court when it was under consideration by the committees, and that the proper department of the Government did not disapprove its enactment, seems to have been the result of failure of the tribe to have available attorneys to represent it.

There is nothing of record showing that the committees were informed that suits at this time under the act of 1925

were barred by the statute of limitations, and the language of the amendment of 1936 clearly indicates that Congress was alone concerned with the matter of attorneys' fees, and what is of vital importance is the fact that practically without exception Congress in enacting special jurisdictional acts involving a reenactment of prior ones or dispensing with the rule of *res adjudicata* expressly provides accordingly, leaving no doubt as to the scope of the statute.

No provision in the act of 1925 fixes a limitation period within which a suit or suits may be brought thereunder. In the absence of such a one, as previously stated, the six-year statute prevails. If during the pendency of the suits timely filed under the original act and prior to their decision, Congress had enacted the act of 1936, the court would have had to proceed under the same in the event the plaintiffs recovered a judgment in the matter of attorney's fees.

The suits brought under the act resulted in a decision adverse to plaintiffs' contention, and hence attorney's fees were not an issue. If plaintiffs' contention is sound, that an amendatory act enacted after the statute of limitations under the original jurisdictional act had barred any additional suits, the result would be that plaintiffs would now acquire the right to commence suits under the original jurisdictional act for a period of seventeen years or more after its passage. We do not believe Congress intended such a result and, if so, express language would have been used to do so.

The facts indicate that Congress may have taken it for granted that the act of 1925 was still in force, and the question was not before it. The committees did not pass upon it, and as the issue here is one of jurisdiction this court is precluded by the statute of limitations from adjudicating the case, in the absence of an express provision having the force and effect of reenacting the act of 1925.

The subject matter of the amendatory act of 1936 bears no relationship to the jurisdictional clause; it refers to a contingency which may or may not happen, and has to do only with an incident of the substantive subject matter of jurisdiction. Whatever else may be said, it was manifestly passed, granting to plaintiffs the most favorable aspect of

Syllabus

the contention advanced, under the mistaken impression that a cause of action did exist in favor of plaintiffs.

This court may not indulge the inference that Congress intended to reenact an act under which causes of action have long since been barred by the statute of limitations, in the absence of express language indicating such an intention. The entire history of special jurisdictional acts in Indian cases unmistakably attests this fact.

Defendant's motion is sustained and the petition is dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

SCIOTO VALLEY SUPPLY COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 42015. Decided April 5, 1937]

On the Proofs

Income and profits tax; credit of overpayment on barred deficiency; filing of claim in abatement; application of sections 609 and 611 of Revenue Act of 1928.—Where the taxpayer filed a claim for abatement of a timely assessment in 1922 of additional income and profits taxes for 1918, which claim was in 1927 allowed in part and certain overpayments of taxes for 1919 and subsequent years applied by credit on the remainder of the additional assessment after the expiration of the statutory period for its collection, such application of the overpayments was not void under the provisions of section 609 of the Revenue Act of 1928, in view of the provisions of section 611 of said Act.

Account stated.—There is no basis for suit or recovery against the Government by a taxpayer on an account stated where the account rendered by the Commissioner of Internal Revenue fails to show a balance due the taxpayer.

Acquiescence of taxpayer in Commissioner's action; estoppel.—Where the taxpayer in 1926 gave bond for payment of additional income and profits taxes timely assessed in 1922 for the year 1918 against which it had a claim in abatement pending, subsequently requested and secured a reduction in the amount of the bond on account of a reduction of the amount due on

the additional assessment by the crediting thereon by the Commissioner of Internal Revenue of certain overpayments of taxes for other years, the taxpayer's action constituted such an acquiescence in or acceptance of the Commissioner's action in crediting such overpayments on the additional assessment that it cannot be heard to question the regularity of such action.

The Reporter's statement of the case:

Mr. Evert L. Bono for the plaintiff. *Ellis, Houghton & Ellis* were on the brief.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Columbus, Ohio.

2. Plaintiff was organized on February 23, 1918, and is still in existence. On its incorporation, plaintiff acquired the assets and business then carried on by the Scioto Valley Supply Company, of Columbus, Ohio, a corporation which had been organized under the laws of the State of Indiana. The stockholders of both the plaintiff and the Scioto Valley Supply Company, the Indiana Corporation, were one and the same. The Indiana corporation surrendered its charter in 1918, shortly after its assets and business had been transferred to the plaintiff.

3. Plaintiff closed its books and rendered all income and profits tax returns, and income tax returns, filed by it for the years 1918 to 1926, both inclusive, on the basis of the calendar year.

4. On June 14, 1919, plaintiff filed its income and profits tax return for the year 1918. The return showed a tax due thereon in the amount of $79,977.55, which tax was assessed and paid. In September 1920 the Commissioner made an additional assessment of income and profits taxes for 1918 of $2,232.00, which was duly paid by plaintiff.

5. During November 1922 a further additional income and profits tax, in the sum of $96,294.77, was assessed against

plaintiff for the year 1918. Notice to pay such additional tax was served on the plaintiff on or about December 16, 1922, by the Collector of Internal Revenue at Columbus, Ohio.

6. Plaintiff did not pay the additional tax of $96,294.77, pursuant to notice and demand, but on January 20, 1923, plaintiff filed with the Collector of Internal Revenue, Columbus, Ohio, a claim for abatement of the entire amount of $96,294.77, contending its profits taxes for the years 1918, 1919, and 1920 should be computed under Sections 327 and 328 of the Revenue Act of 1918. The Commissioner considered the claim for abatement, and on February 6, 1926, plaintiff was advised that after a careful consideration of all the facts, its application for assessment of taxes for the years 1918, 1919, and 1920, under the provisions of Sections 327 and 328 of the Revenue Act of 1918, had been denied.

7. On March 23, 1926, plaintiff, by sworn memorandum, petitioned the Commissioner of Internal Revenue for a reconsideration of his action in denying it the benefit of the relief provisions as shown in finding 6.

8. On March 23, 1926, the Collector of Internal Revenue at Columbus, Ohio, required the plaintiff to file with him a surety bond in the principal sum of $100,000 to assure the payment of the additional $96,294.77 for 1918.

9. On March 1, 1927, the Commissioner of Internal Revenue notified the plaintiff, by registered mail, that its claim for abatement of the additional tax assessment for the year 1918, in the sum of $96,294.77, would be allowed in the sum of $35,193.03, and rejected in the amount of $61,101.76. Plaintiff was allowed sixty days from the date of the letter within which to file a petition with the United States Board of Tax Appeals contesting in whole or in part the correctness of the Commissioner's determination.

10. On April 27, 1927, plaintiff filed a petition with the United States Board of Tax Appeals, contesting the determination so made by the Commissioner in his letter of March 1, 1927, on the ground that the collection thereof was barred by the statute of limitations. The Commissioner of Internal Revenue on June 27, 1927, filed with the Board an answer to plaintiff's petition in which he denied that the collection of the deficiency of $61,101.76, as determined by

him in his letter of March 1, 1927, was barred by the statute of limitations.

11. Under date of June 17, 1929, a hearing on the petition and answer was had before the Board. On August 28, 1929, the Board handed down its opinion, which is reported in 17 B. T. A., 173. The Board held that the collection of the deficiency was barred by the statute of limitations. On December 5, 1929, final order and decision was entered by the Board in which it was decided that the collection of the deficiency for the year 1918 was barred by the statute of limitations. No petition to review the decision of the Board by the Court of Appeals of the District of Columbia, or by the United States Circuit Court of Appeals having jurisdiction, was, or has been, filed by either party.

12. Returns were filed by plaintiff, and taxes were assessed and paid thereon as follows:

Kind of return	Year	Date filed	Tax assessed and paid
Income and profits tax return	1919	Mar. 12, 1920	$34, 689. 22
" " " " "	1920	Mar. 15, 1921	104, 947. 69
" " " " "	1921	Mar. 14, 1922	16, 628. 31
Income tax return	1922	Mar. 15, 1923	10, 808. 41
" " "	1924	Mar. 13, 1925	8, 476. 39
" " "	1926	Mar. 14, 1927	8, 407. 79

Thereafter, and on March 11, 1927, plaintiff filed claims for refund for overpayment of taxes, as follows:

1919	$18, 668. 80
1920	8, 459. 95
1921	15, 740. 80
1922	4, 008. 69
1924	8, 476. 38

13. The Commissioner of Internal Revenue made an audit of the returns and considered the claims for refund filed, referred to in finding 12, and determined that the plaintiff had made overpayment of such taxes. In accordance with such determination the Commissioner forwarded to the plaintiff certificates of overassessment for each of the years showing the overpayment of taxes for each of these years, as determined by the Commissioner. The approximate date on which the certificates were forwarded to the plaintiff,

and the amounts of overpayments shown by such certificates, and the years for which the overpayments were made, are as follows:

Year	Date certificate furnished	Amount of overpayment	Year	Date certificate furnished	Amount of overpayment
1919	Apr. 26, 1927	$18, 668. 80	1922	Sept. 30, 1927	$4, 952. 67
1920	Apr. 26, 1927	8, 459. 95	1924	Sept. 30, 1927	8, 476. 38
1921	Sept. 30, 1927	14, 753. 37	1926	Sept. 30, 1927	1, 046. 79

The Commissioner of Internal Revenue credited against the deficiency determined by him in his letter of March 1, 1927, for the year 1918, certain portions of such overpayments. The years for which such overpayments were made, the amounts of such overpayments so credited, and the dates on which such credits were made, are as follows:

Year	Amount credited	Dates credits made	Year	Amount credited	Dates credits made
1919	$2, 941. 46	Apr. 26, 1927	1922	$4, 952. 67	Sept. 30, 1927
1920	8, 459. 95	Apr. 26, 1927	1924	2, 756. 98	Sept. 30, 1927
1921	14, 753. 37	Sept. 30, 1927	1926	1, 046. 79	Sept. 30, 1927

14. The dates on which the overpayments for each year were made to the United States, which were credited against the deficiency for the year 1918, as set forth in finding 13, are as follows:

Year	Date of payment	Amount	Year	Date of payment	Amount
1919	Dec. 26, 1922	$2, 941. 41	1922	Sept. 14, 1923	$1, 542. 59
1920	Dec. 14, 1921	5, 746. 04	1922	Dec. 14, 1923	2, 466. 10
1920	Dec. 26, 1922	2, 713. 91	1922	Mar. 22, 1926	943. 98
1921	Mar. 14, 1922	2, 282. 14	1924	Sept. 14, 1925	637. 89
1921	June 14, 1922	4, 157. 08	1924	Dec. 14, 1925	2, 119. 08
1921	Sept. 14, 1922	4, 157. 08	1926	Dec. 14, 1927	1, 046. 79
1921	Dec. 14, 1922	4, 157. 07			

15. Subsequent to the time the credits were made, as set out in finding 13, plaintiff petitioned the collector to have the original assessment bond for $100,000, referred to in finding 8, reduced for the reason that the outstanding assessment had been reduced to $25,384.60. Plaintiff's request was considered by the collector and on November 22, 1928, the bond was reduced to $50,000.

Opinion of the Court

16. After the decision of the Board of Tax Appeals for 1918 became final, the Commissioner issued a certificate of overassessment for 1918, which showed an overassessment of $25,384.60, determined as follows:

Tax assessed:		
Original Account #40512		$77,744.55
Additional: September 1920, Page 1, Line 1		2,232.00
Additional: November 1922, Page 9, Line 1		96,294.77
Total assessed		176,271.32
Less: Previously allowed		35,193.03
Net assessment		141,078.29
Correct tax liability	$141,078.29	
Less Amount uncollectible under provisions of Section 607 of the Revenue Act of 1928	25,384.60	
		115,693.69
Overassessment allowable		25,384.60

The adjustment of your income and excess profits tax liability as indicated above is in accordance with the order of the United States Board of Tax Appeals in Docket No. 27602.

In the determination of this overassessment consideration has been given to your claims for abatement of $96,294.77 and refund of $34,911.22.

Since the amount of the overassessment, $25,384.60, had not been collected, it was abated by the Commissioner.

17. April 13, 1931, the plaintiff filed a claim for refund for 1918 of $34,911.22 and in substance alleged that the credits for 1919, 1920, 1921, 1922, 1924, and 1926, which had been made against the barred deficiency for 1918, were improper and, therefore, the amount thereof should be refunded to plaintiff. The claim has not been allowed by the Commissioner.

The court decided that plaintiff was not entitled to recover.

WHALEY, *Judge*, delivered the opinion of the court:

Various contentions are adanced by plaintiff as a basis of recovery of the income tax involved in this case and likewise defenses thereto are predicated on sundry grounds, but we think the case comes squarely within the provisions of section 611 of the Revenue Act of 1928, and, therefore, a discussion of all points presented becomes unnecessary.

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During November 1922 the Commissioner made a timely assessment of an additional tax against plaintiff of $96,-294.77 for 1918. Instead of paying the tax, plaintiff filed a claim in abatement for the entire amount. In 1926 the collector required plaintiff to file a bond of $100,000 to assure payment of the additional assessment. In the meantime consideration was being given to the contentions advanced in connection with the abatement claim and ultimately in 1927 the Commissioner advised plaintiff of his final determination thereon, in which he allowed the claim for $35,193.03 and rejected it for $61,101.76. Plaintiff thereupon appealed to the Board of Tax Appeals, in which appeal the sole contention raised was that the statute of limitations had run on the collection of the assessment for which the abatement claim was filed.

At that time the Commissioner had under consideration claims for refund filed by plaintiff for 1919, 1920, 1921, 1922, and 1924, and in connection with such consideration found overpayments for those years as well as for 1926. The Commissioner credited these overpayments to the extent of $34,911.22 against the rejected portion of the abatement claim for 1918, two of such credits being made in April 1927 during the 60-day period after the issuance of the deficiency notice and prior to the filing of the appeal with the Board. The credits for the years 1921, 1922, 1924, and 1926 were made while the appeal was pending before the Board.

After the making of the credits referred to above, and prior to the decision by the Board, plaintiff requested the collector to reduce the amount of its bond from $100,000 to $50,000 since the amount of the outstanding assessment for 1918 had been reduced by the credits referred to above and that request was granted. Thereafter, the Board of Tax Appeals held that the collection of the additional assessment for 1918 was barred.

What plaintiff now seeks to recover are the overpayments for 1919, 1920, 1921, 1922, 1924, and 1926 which were credited against the assessment for 1918. Such recovery must fail because of section 611 of the Revenue Act of 1928. Certainly, if the assessment for 1918 had been collected in

cash at a time such collection was barred, section 611 would be a complete defense against a recovery of the cash so paid, when, as in this instance, a claim in abatement had been filed. A reading of sections 607 and 609 in conjunction with section 611 shows that essentially the same situation exists with respect to a payment by credit. Those sections read as follows:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

SEC. 609. ERRONEOUS CREDITS.—

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT.—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

Under section 609 the credits would be void only in the event a payment in respect of the additional assessment for 1918 would be considered an overpayment under section 607.

But because of section 611 which prohibits the refunding of a payment made in satisfaction of such a barred deficiency, a payment made on account of the barred assessment, for which an abatement claim was filed, would not be considered an overpayment within the meaning of section 607. The credits were therefore not void and their recovery must be denied.

Essentially the same situation existed in the *MacAndrews & Forbes Company case*, 78 C. Cls. 787, where an overpayment for 1918 had been credited against barred deficiencies for 1916 and 1917. Suit was brought in that case for the 1918 overpayment and the court, in denying recovery, said:

> The assessments [for 1916 and 1917] having been made within the period provided by the Act of 1921, Section 611 of the Act of 1928 applies for the reason that claims in abatement for each year [1916 and 1917] had been filed and the collection of the taxes thereby delayed, and under this section the credits [of the overpayment for 1918] were not void and not refundable.

To the same effect was *Atlantic Mills of Rhode Island* v. *United States*, 78 C. Cls. 217, 230, where plaintiff was seeking to recover an overpayment for 1918 which had been credited against a barred deficiency for 1917 and, in denying recovery, the Court said:

> The right of plaintiff to recover that portion of the overpayment for 1918 sued for depends entirely upon whether collection of the tax for 1917 by credit or otherwise was barred by the statute of limitation on November 25, 1925 [the date the credit was made]. The period of five years provided by the Revenue Act of 1924 and prior Revenue Acts for the collection of any amount in respect of the tax for 1917, as extended by the consents in writing entered into by the plaintiff and the Commissioner, had expired at the time the 1917 tax was collected by credit, but this credit was not void under section 609 of the Revenue Act of 1928 and the provisions of section 611 are applicable.

The contention of plaintiff with respect to recovery on an account stated must be decided adversely on the basis of *MacAndrews & Forbes*, *supra*, and cases therein cited as

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well as many other similar cases. The further contention that the credits were void because made when the Commissioner was prohibited under section 274 of the Revenue Act of 1926 is likewise without merit. Section 283 (i) of the same act provides an exception to section 247, *supra*, as follows:

> (i) In cases within the scope of subdivision (e), (f), or (g), if the Commissioner believes that the collection of the deficiency will be jeopardized by delay, he may, despite the provisions of subdivision (a) of section 274 of this Act, instruct the collector to proceed to enforce the payment of the unpaid portion of the deficiency, and notice and demand shall be made by the collector for the payment thereof. Within 10 days after such jeopardy notice and demand the person liable for the tax may obtain a stay of collection of the whole or any part of the amount included in the notice and demand by filing with the collector a bond in like manner, under the same conditions, and with the same effect, as in the case of a bond to stay the collection of a jeopardy assessment under section 279 of this Act.

Whether the Commissioner considered the collection of the tax in jeopardy does not appear, though in view of what occurred thereafter, we do not regard this as material. At the time the credits were made, the Commissioner had plaintiff's bond for $100,000 to assure the collection of an outstanding assessment of $61,101.76, and after the credits of $34,911.22 had been applied against such assessment, together with certain minor adjustments, the outstanding assessment was reduced to $25,384.60. With the assessment so reduced, plaintiff requested and the Commissioner granted a reduction of the bond to $50,000. Plainly such reduction was made in view of an acquiescence in, or acceptance of, the Commissioner's action in making the credits and plaintiff may not now be heard to question its irregularity, if such there be.

It follows that the petition must be dismissed. It is so ordered.

WILLIAMS, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

Syllabus

GEORGES EDMOND PHILLIPPE SIEGEL AND ANDRE PHILLIPPE OSCAR SIEGEL v. THE UNITED STATES

[No. 42616. Decided April 5, 1937]

On the Proofs

Estate tax; refund claim; statute of limitation.—The limitation period of four years provided in section 3228, Revised Statutes, as amended, with reference to the filing of claims for refund of taxes in ordinary cases does not apply to refunds directed to be made by section 403 (b) (2) (3) of the Revenue Act of 1921 where the tax was collected from the estate of a second decedent dying prior to the enactment of the estate tax provisions of the Revenue Act of 1918.

Same.—The intent of Congress in section 403 (b) (2) (3) of the Revenue Act of 1921 was that all estates which had paid a tax by reason of inclusion in the net estate of property of a prior estate which had been previously taxed within five years should be entitled to deduction of such property, a redetermination of the tax, and refund of the excess tax that had been paid, without regard to the limitation of time within which the Commissioner of Internal Revenue could make a refund without claim, or the time within which claims for refund could be filed under section 3228, Revised Statutes.

Same.—By enactment of the retroactive provision of section 403 (b) (2) (3) of the Revenue Act of 1921, Congress intended that the Commissioner of Internal Revenue should, with or without a formal claim, redetermine the tax of estates of all decedents dying prior to February 25, 1919, that had not received the benefit of deduction of such portions thereof as had within a period of five years been taxed as a part of a prior estate, and refund any resulting overpayment; and that in the event of the Commissioner's refusal to make such refund, suit therefor might be brought within two years after such refusal or disallowance of refund.

Statutory construction.—Provisions of the general revenue laws such as the provisions of section 403 (b) (2) (3) of the Revenue Act of 1921 must be viewed and interpreted in the light of the obvious policy of Congress in their enactment and the well-recognized procedure of the Treasury Department and the courts in their administration and enforcement.

Same.—Statutes should have a reasonable construction and the language must be interpreted with reference to the subject matter and the general course of business to which they relate,

Reporter's Statement of the Case

and in such manner that the beneficent provisions of remedial laws may not be thwarted by nice technicalities obviously not within the minds of the legislators.

Interest on refund under retroactive statute.—The general statutes providing for interest on refunds of tax overpayments are applicable to refunds of estate tax under the retroactive provisions of section 403 (b) (2) (3) of the Revenue Act of 1921 providing for refund of estate taxes paid on property of the decedent's estate which had been a part of the estate of another person who had died within five years of the death of the decedent.

The Reporter's statement of the case:

Mr. Harry S. Hall for the plaintiffs.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

Plaintiffs, residents and citizens of Paris, France, and the sole and only heirs at law and next of kin of their mother, Marie Jeanne Bruneau Siegel, deceased, seek to recover $23,577.70, overpayment of estate tax under section 403 (b) (2) and (3) of the Revenue Act of 1921. This section provided that property which had been subjected to an estate tax should not again be taxed within five years and that any tax which had been paid as a result of twice including property in determining the estate tax to decedents, the last of whom had died within five years of the first, should be refunded to the estate of the last decedent. This section was made retroactive to September 8, 1916, the date of the enactment of the Revenue Act of 1916.

The parties are in accord that the limitation period of four years provided in section 3228 of the Revised Statutes as amended with reference to the filing of claims for refund in ordinary cases does not apply to refunds directed to be made by section 403, *supra*, in cases where the tax was collected from the estate of a second decedent dying prior to the enactment of the estate tax provisions of the Revenue Act of 1918. Plainly this is correct because the Revenue Act of 1921 was enacted more than five years after September 8, 1916.

The estate of Marie Siegel filed a claim for refund March 11, 1932, seeking a refund under section 403 (b) (2) and (3) of the Revenue Act of 1921 of the tax paid upon the ground that an estate tax had been paid within five years prior to her death on certain shares of stock included in her estate. This claim was rejected May 6, 1932, and this suit was instituted March 16, 1934.

The defendant contends however that plaintiffs cannot recover for the reasons that the provisions of section 3226, Revised Statutes, as amended, authorizing the institution of suit within two years after the disallowance of a refund, do not apply since this was a Congressional directed refund; that the limitation for the recovery thereof by suit is governed by section 156 of the Judicial Code providing a limitation for bringing suit of six years from the date the cause of action accrued; and that a cause of action for the recovery of a tax of the character here involved accrued November 23, 1921, the date of the enactment of the Revenue Act of 1921. Defendant further contends that if the court should hold that the suit is not barred plaintiffs are not entitled to interest. Plaintiffs take the position that if it should be held the cause of action for the recovery of the overpayment here involved accrued on November 23, 1921, rather than on the date the Commissioner refused to refund the same, they are, nevertheless, entitled to recover for the reason that the limitation period of six years, provided in section 156 of the Judicial Code, does not apply to persons beyond the seas.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiffs are residents and citizens of Paris, Republic of France. They are the only children and heirs at law of their mother, Marie Jeanne Bruneau Siegel, who was, before her death, a resident and citizen of Paris, France. Oscar Othon Siegel, the father of the plaintiffs, and a resident and citizen of France, died in Paris December 17, 1917. At the time of his death he was the owner of certain shares of stock in domestic corporations organized

and operated in the United States. The estate of Oscar Siegel filed an estate-tax return December 3, 1920, showing an estate tax of $18,842.22 which was paid December 30, 1920. The Commissioner of Internal Revenue audited this return and on February 18, 1921, advised the estate that he had determined the net estate to be $346,474.06, resulting in a total tax, together with interest, of $20,924.07. The amount of $2,111.36, being the excess over the tax originally paid, was collected February 28, 1921.

Oscar Othon Siegel was survived by his widow, Marie Jeanne Bruneau Siegel, who inherited the above-mentioned shares of stock. Marie Siegel died in Paris, France, May 1, 1918. Her estate filed a return December 28, 1920. The shares of stock listed in her estate-tax return were the same shares listed and taxed in the estate-tax return of her husband, Oscar Siegel, with the following exceptions: The return of Marie Siegel included 240 shares of additional stock of the General Electric Company which were not included in the prior estate, and the return of Marie Siegel included only 300 shares of stock of the United States Rubber Company, preferred, whereas the return of the estate of Oscar Siegel included an additional 200 shares.

Upon the filing of this return the estate of Marie Siegel paid an estate tax of $23,903.25. The Commissioner of Internal Revenue audited this return and on January 24, 1921, gave the estate written notice that he had determined a net estate of $409,473.88 and a total tax of $23,757.91 and interest thereon. Accrued interest in the amounts of $2,221.34 and $23 was paid February 8, 1921, and in March 1921, respectively.

2. On March 11, 1932, the Commissioner having failed to redetermine the tax and refund the excess under section 403, the estate of Marie Siegel filed a claim for refund of the estate taxes paid and interest thereon under the provisions of sections 402 and 403 (b) (2) and (3) of the Revenue Act of 1921. This refund was claimed upon the ground that an estate tax had been paid upon the shares of stock included in the return of Marie Siegel within five years from the date of the decedent's death and

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that the estate was therefore entitled to a refund under the provisions of section 403 (b) (2) and (3). The Commissioner rejected this claim May 6, 1932, on the ground that it was not filed within four years after the estate tax was paid.

3. Plaintiffs herein have at all times resided in Paris, France, and have never been in the United States or in any of its territories or possessions.

If this suit was not barred at the time it was instituted, the amount of estate tax which plaintiffs are entitled to recover under section 403 (b) (2) and (3) of the Revenue Act of 1921 is $23,577.70.

The court decided that plaintiffs were entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The principal question in this case is whether this suit was barred at the time it was instituted. We are of opinion that it was not. Section 403 (b) (2) and (3) of the Revenue Act of 1921 provided, so far as pertinent here, as follows:

> In the case of a nonresident, by deducting from the value of that part of his gross estate which at the time of his death is situated in the United States * * * an amount equal to the value of any property forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent where such property can be identified as having been received by the decedent from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received: Provided, That this deduction shall be allowed only where an estate tax under this or any prior Act of Congress was paid by or on behalf of the estate of such prior decedent, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gross estate of such prior decedent, and only to the extent that the value of such property is included in that part of the decedent's gross estate which at the time of his death is situated in the United States and not deducted under paragraphs

> (1) or (3) of sub-division (b) of this section. This deduction shall be made in case of the estates of all decedents who have died since September 8, 1916. * * *
>
> In the case of any estate in respect to which the tax has been paid, if necessary to allow the benefit of the deduction under paragraphs (2) and (3) of sub-division (a) or (b) the tax shall be redetermined and any excess of tax paid shall be refunded to the executor.

These provisions were continued without change in the Revenue Act of 1924 (sec. 1100 (c)), and in the Revenue Acts of 1926, 1928, 1932, and 1936, and remain in force at the present time. Section 403 of the Revenue Act of 1921 became effective November 23, 1921, more than five years after the passage of the Revenue Act of 1916, and the same provisions in the Revenue Act of 1924 became effective eight years after the passage of the Revenue Act of 1916. No change was made in the Revenue Act of 1926, which became effective ten years after the enactment of the estate tax provision of the 1916 Act, and such retroactive provisions quoted above remain in force at the present time. Since their enactment these provisions have directed that a deduction of the value of property previously subjected to an estate tax within five years shall be made in case of the estates of all decedents who have died since September 8, 1916, and that, in the case of any estate in respect to which the tax has been paid, if necessary to allow the benefit of the deduction the tax shall be redetermined and any excess tax paid shall be refunded to the executor. These provisions clearly made the excess tax previously paid an overpayment within the meaning of other sections of the same statutes, and they were, we think, directed in the first instance to the officials of the Treasury Department charged with the duty of administering the revenue laws. The direction, that in determining the value of a net estate there should be deducted therefrom the value of any property that had been subjected to an estate tax within five years, first appeared in section 403 (a) (2) and (b) (2) of the Revenue Act of 1918 which became effective February 25, 1919, but that section was not retroactive and applied only to those cases where the second decedent died

after February 24, 1919. In the Revenue Act of 1921 the provision for the deduction was made retroactive to September 8, 1916, and in the case of any estate in respect of which the tax had already been paid Congress directed that the officials charged with the duty of determining, assessing, and collecting taxes, and the refunding of excess taxes paid, should, if necessary to allow the benefit of the deduction under section 403 (b) (2) and (3), redetermine the tax and refund the excess to the executor. It is clear from these sections that Congress intended that all estates which had paid a tax by reason of the inclusion in the net estate of property which had been previously taxed within five years should be entitled to have the benefit of this deduction, the tax redetermined and the excess tax refunded without regard to the limitation of time within which the Commissioner of Internal Revenue could make a refund without claim, or the time within which claims for refund could be filed under section 3228, Revised Statutes. The Commissioner has correctly so held in Art. 99 of Regs. 70.

Thus far the parties are in accord as to the statute of limitation feature. But counsel for the defendant insists that for the purpose of suit to recover any overpayment resulting from the failure of any estate to receive the benefit of a deduction for property previously taxed within five years where the second decedent died prior to the effective date of the estate tax provisions of the Revenue Act of 1918, the limitation period is six years from November 23, 1921, the date of enactment of section 403 of the Revenue Act of 1921, and that since this suit was not instituted within six years after that date it is barred. In other words, counsel for defendant contends that the provisions of section 3226, Revised Statutes, as amended by section 1014 (a) of the Revenue Act of 1924 allowing a suit to be brought for the recovery of a tax within two years after the disallowance by the Commissioner of a refund, do not apply to the retroactive provisions of section 403. This position seems to be based on the theory that courts audit returns, determine net estates, and make refunds; that a suit to recover an internal revenue tax is, in effect, an appeal from the Commissioner's decision on a claim

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for refund and that since the obvious purpose and intent of section 403 of the Revenue Act of 1921, which was continued in force in subsequent revenue acts, were to require a return of the excess tax paid by reason of the failure of an estate to receive the benefit of a deduction provided therein without regard to other provisions requiring the filing of a formal claim for refund within a specified time, the provisions of section 3226 of the Revised Statutes with reference to suit must likewise be discarded in such case. In this we think counsel is in error. The statute, while plainly inconsistent with section 3228, evidences no purpose on the part of Congress to disregard the provisions of section 3226, or any other provision of law, requiring the Commissioner, in the first instance, to audit returns, determine tax liability, and to make refunds of overpayments determined in accordance with the statutes. Statutory provisions found in general revenue statutes of the character with which we are here concerned must be viewed and interpreted in the light of the obvious policy of Congress in their enactment and the well-recognized procedure of the Treasury Department and the courts in their administration and enforcement. By enactment of this retroactive provision in the estate tax title of the Revenue Act of 1921, which was continued in all subsequent revenue acts, Congress clearly intended, we think, that the Commissioner of Internal Revenue should, with or without a formal claim, redetermine the tax of estates of all decedents dying prior to February 25, 1919, that had not received the benefits of the deduction of property which had been taxed within five years and refund any overpayment found to have been made on that account, and that, in the event of his refusal to refund any such tax, suit might be brought within two years after such refusal or disallowance of a refund. Although section 3226 of the Revised Statutes speaks of suits for the recovery of taxes alleged to have been erroneously or illegally assessed or collected, to the filing of claims therefor, and to the institution of suits within two years after the disallowance of the part of *such claim* to which such suits relate, we find no difficulty in the circumstances in applying the limitation provisions of that section to suits for the recovery of an overpayment of a character here involved. Statutes should have a reasonable construc-

tion and the language must be interpreted with reference to the subject matter and the general course of business to which they relate and in such manner that the beneficent provisions of remedial laws may not be thwarted by nice technicalities obviously not within the minds of the legislators. In *Maul* v. *United States*, 274 U. S. 501, 508, the court said "In this situation effect should be given to the familiar rule that in construing altered revenue laws 'the whole system must be regarded in each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of Congress.'" Although the tax here in question was not an overpayment at the time it was assessed and paid, the retroactive provisions in section 403 relating to estate taxes generally made such tax an erroneous exaction and specifically directed its return to the taxpayer. Thus, the statute, while not denying to the taxpayer the right to make a demand or file a claim for such tax, took the place of a claim required by other provisions relating to refunds of internal-revenue taxes generally, thereby leaving unimpaired the taxpayer's right, upon the Commissioner's refusal to make a refund or upon his disallowance of a demand or claim, to institute suit within two years after the Commissioner's disallowance. Any other conclusion would thwart the purpose of the statute. Surely Congress did not intend to force all such taxpayers directly into court without giving the Commissioner an opportunity to act on the cases in the usual and ordinary way. Such a conclusion would result in holding that the preservation of the same retroactive provisions in the Revenue Acts of 1924 to 1936, inclusive, was for the most part a vain act and accomplished nothing.

In the case at bar the Commissioner of Internal Revenue disallowed and refused to make the refund to the estate of Marie Siegel on May 6, 1932. This suit was instituted within two years thereafter. It was, therefore, not barred at the time the petition was filed.

The next question is whether interest is allowable. Counsel for defendant insists that interest may not be allowed, citing *Sunny Brook Distillery Co.* v. *United States*, 72 C. Cls. 157. We think that case is distinguishable from the one at bar. The *Sunny Brook case* arose under a spe-

cial act of Congress February 11, 1925, which was not a part of a general revenue statute. This special act authorized the Commissioner to return to distillers, upon claim, the difference between a tax of $6.40 and $2.20 per proof gallon on any distilled spirits theretofore produced and then owned by such distiller and stored on the premises of the distillery where produced. That statute was based upon special circumstances not present here. The higher tax had been imposed upon the manufacturer of distilled spirits at a time when the manufacture and sale thereof were legal but the sale of which had been outlawed by constitutional amendment about a year later.

In the case at bar, the statutory provision with which we are concerned was enacted as a part of a continuing general revenue statute of long standing. In the Revenue Act of 1918 a change was made in the law with reference to deductions to be made in determining the value of a net estate subject to tax and in the Revenue Act of 1921, when such provision was being reenacted, the Congress made it retroactive to September 8, 1916, and required that it be applied in the case of estates of all decedents who had died since that time and that any tax that had been paid, by reason of failure of such estates to receive the benefits of such deductions, should be refunded. The provision was inserted as a Senate amendment and was agreed to in conference. Nothing was said indicating a purpose that interest provided for under other provisions of the same statute should not be paid on such refunds and we may not read into section 403 a condition which is not justified by the language used. *Maul v. United States*, *supra*. The retroactive language of the section made the excess tax paid in a prior year, because of the failure to receive the benefit of the deduction therein provided, an overpayment and an erroneous exaction within the meaning of other provisions of the same and subsequent statutes in which these terms are found. In the absence of words to express a different purpose the interest provisions of the statutes containing the provision allowing a deduction for property previously taxed within five years should be held applicable to all overpayments and refunds arising thereunder. As early as April 1923 it was held that

interest was payable on refunds under section 403. 2 Decs. Comp. Gen. 684. Provisions similar to the retroactive provisions of section 403 may be found in the revenue statutes, such as section 284 (c) of the Revenue Act of 1926, directing the refund, without a claim, of excess taxes paid for previous years by reason of the failure of the taxpayer to take adequate deductions in such previous years for depreciation. So far as we have been able to find, it has never been contended that in such cases interest on such overpayments was not allowable. When Congress has desired that interest be not paid on an overpayment or excess collection authorized or provided for in a general revenue statute containing also provisions for the payment of interest on refunds, it has specifically so directed. See Section 325 of the Revenue Act of 1926.

Section 1116 (a), which governs this case, provides that upon the allowance of a refund interest shall be allowed and paid on the amount thereof at the rate of 6% per annum from the date of payment. In the circumstances of this case we think the provisions of that section apply to the overpayment here involved and that plaintiffs are entitled to interest.

Judgment will be entered in favor of plaintiffs for $23,577.70 with interest at 6% per annum thereon as provided by law. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

DETROIT TRUST CO., ADMINISTRATOR *DE BONIS NON*, W. W. A., OF THE ESTATE OF JULIA C. McPHERSON, DECEASED, v. THE UNITED STATES

[No. 42068. Decided April 5, 1937]

On the Proofs

Estate tax; claim and suit for refund; proper claimant; statutes of limitation.—The administrator *de bonis non*, w. w. a., and not residuary legatees, was the proper party to prefer claim and

secure refund, under the retroactive provisions of section 403 (b) (2) (3) of the Revenue Act of 1921, of estate tax paid on property of the decedent's estate which had been a part of the estate of another person who had died within five years preceding the decedent's death; and suit for refund of such tax could be brought within two years after rejection of the claim by the Commissioner of Internal Revenue. It is immaterial that a claim had been presented by the legatees and rejected by the Commissioner more than two years before suit was brought by the administrator.

Note.—For the decision of other questions involved in this case, see similar case of *Siegel* v. *United States*, ante, p. 551.

The Reporter's statement of the case:

Mr. Ralph W. Barbier for the plaintiff. *Mr. Raymond H. Berry* and *Mr. Arthur L. Evely* were on the brief.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

Plaintiff was the executor of the estate of Alexander McPherson, who died July 23, 1917, and of the estate of his wife, Julia C. McPherson, who died October 10, 1917. After having closed the estates and having been discharged in May 1922 as such executor of the estate of Julia C. McPherson, it was reappointed administrator *de bonis non*, w. w. a., of the estate of Julia C. McPherson in April 1932, and brings this suit to recover an overpayment of $35,491.36, with interest, in respect of the estate tax of the estate of Julia C. McPherson by reason of the disallowance by the Commissioner of Internal Revenue of a claim for refund for that amount and his refusal to make such refund under the retroactive provisions of section 403 (a) (2) and (b) (3) of the Revenue Act of 1921. The Commissioner rejected the claim and refused to make the refund on the ground that the refund claim was not filed within four years after the estate tax was paid.

In this suit the defendant correctly concedes that the limitation of four years for the filing of claims for refund under section 3228 of the Revised Statutes does not apply to cases arising under the retroactive provisions of section 403

of the Revenue Act of 1921 which were continued in the Revenue Act of 1924 and all subsequent acts. But it is contended that the limitation period for bringing suit to recover such overpayment dates from the enactment of the Revenue Act of 1921 on November 23, 1921, and is governed by section 156 of the Judicial Code. It is therefore insisted that this suit is barred because not commenced within six years after November 23, 1921. Further contention is made that if plaintiff is entitled to recover the overpayment under the provisions of section 403 (a) (2) and (b) (3) of the Revenue Act of 1921, by reason of the failure of the estate to receive the benefit of the deduction of property previously taxed within five years, interest should not be allowed on such overpayment.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Alexander McPherson, a resident of Michigan, died testate July 23, 1917. In his will he named the Detroit Trust Company, plaintiff herein, executor of his estate. The estate was closed and the executor was discharged. The executor made a federal estate tax return of all the property of Alexander McPherson and paid the federal estate tax due thereon under the Revenue Act of September 8, 1916.

Julia C. McPherson, the widow of Alexander McPherson, received certain property from the estate of Alexander McPherson which had been included in his net estate, upon which a federal estate tax had been paid. Thereafter Julia C. McPherson died testate October 10, 1917, and the Detroit Trust Company, plaintiff herein, was named executor of her estate. A federal estate tax return was filed for the estate of Julia C. McPherson in due course in accordance with the Revenue Act of 1916 as amended by the Act of October 3, 1917. In the determination of the value of her estate the property which she had received from the estate of her husband, Alexander McPherson, was again included for the purpose of the tax. The tax computed upon the net estate of Julia C. McPherson, which

Reporter's Statement of the Case

included such previously taxed property, was $45,964.91 which was paid in the amounts of $30,812.06 on January 14, 1918, $13,603.37 on October 3, 1918, $8.76 on June 3, 1919, and $1,540.72 on October 16, 1919. The estate of Alexander McPherson had theretofore paid a total estate tax of $167,018.17. The executor of the estate of Julia C. McPherson closed her estate and was discharged May 16, 1922, and its bond was canceled.

The federal estate tax due upon the net estate of Julia C. McPherson, after deducting from the value of her gross estate an amount equal to the value at the time of her death of the property received by her as a share in the estate of her husband, who had died within five years prior to her death, but not in excess of the value placed by the Commissioner upon such previously taxed property in determining the net estate of the prior decedent, Alexander McPherson, was $10,474.55. The excess of the estate tax paid by the estate of Julia C. McPherson over the tax due by her estate under the retroactive provisions of section 403 (a) (2) of the Revenue Act of 1921 and similar provisions of the Revenue Acts of 1924 and 1926 was $35,491.36.

2. On October 2, 1928, Raymond H. Berry as attorney for John C. Ellsworth, the First Presbyterian Church of Howell, Michigan, and the Women's Missionary Society of the First Presbyterian Church of Detroit, being some of the equally participating residuary legatees under the will of Julia C. McPherson, filed with the Treasury Department a claim for refund for $45,000 on the ground that certain property included in determining the net value of the estate of Julia C. McPherson had been previously taxed in the estate of her husband, Alexander McPherson; that such previously taxed property should be excluded from the estate of Julia C. McPherson and the excess tax found to have been paid should be refunded to the residuary legatees under the provisions of section 402 (a) (2) of the Revenue Act of 1921. The Commissioner rejected this claim December 11, 1928, on the ground that it was not filed within four years as required by section 3228, Revised Statutes.

3. April 11, 1932, a petition was filed with the Probate Court of Wayne County, Michigan, to reopen the estate of Julia C. McPherson, deceased, and to have the Detroit Trust Company, a Michigan corporation, plaintiff herein, appointed administrator *de bonis non* of said estate. This petition was granted, and the Detroit Trust Company was appointed such administrator. It duly qualified as such and is now and since that time has been acting in such capacity. Thereupon, on May 5, 1932, the Detroit Trust Company as administrator *de bonis non* made demand of the Commissioner of Internal Revenue and filed a claim for refund for $42,837.05, with interest, reciting all the necessary facts and setting forth computations and claiming a refund of taxes paid arising from the benefits granted by the retroactive provisions of section 403 of the Revenue Act of 1921. This claim for refund was rejected by the Commissioner August 22, 1932, and this suit was instituted September 29 following.

The court decided that plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The issues involved in this case, except as to one point, are governed by the decision of this court in *Georges Edmond Phillippe Siegel* and *Andre Phillippe Oscar Siegel*, No. 42616, decided this date. The point of difference results from the filing by the attorney for certain residuary legatees under the will of Julia C. McPherson of a claim for refund in 1928 which the Commissioner of Internal Revenue rejected December 11, 1928. We think this circumstance has no bearing upon the right of the Detroit Trust Company, plaintiff herein, as the original executor and as administrator *de bonis non* of the estate of Julia C. McPherson, to demand the refund of the overpayment resulting from the retroactive provisions of section 403 of the Revenue Act of 1921 continued in subsequent revenue acts, nor upon the timeliness of this suit by the Detroit Trust Company which suit was instituted within about a month after the Commissioner disallowed its claim and refused to

refund to it the excess of the tax originally paid over that due under the provisions of section 403.

After allowing the estates of all decedents dying subsequent to September 8, 1916, a deduction from the gross estate of the value of property previously taxed within five years, paragraph 3 of sub-division (b) of section 403 of the Revenue Act of 1921 provided that in the case of any estate, in respect of which the tax had been paid, if necessary to allow the benefit of the deduction the tax should be redetermined and any excess tax paid should "be refunded to the executor." Section 400 of the estate tax title of the same and subsequent statutes provided that the term "executor" means the executor or administrator of the decedent or, where there is no executor or administrator appointed, any person in actual or constructive possession of the property of the decedent. The plaintiff therefore, and not the residuary legatees, was the proper party to demand and receive the refund in question. The demand by plaintiff upon the Commissioner to return the tax to it as the authorized representative of the estate of Julia C. McPherson, and the person who had paid it, was not a mere duplicate of a demand previously made by certain residuary legatees of that estate. Plaintiff's demand was made in its own right and in accordance with the statute, and such demand was not barred at the time made. Upon the Commissioner's disallowance of plaintiff's demand and his refusal to make the refund to it in accordance with the command of the statute, plaintiff had two years under section 3226 of the Revised Statutes, as amended, within which to bring suit as the authorized and legal representative of the estate. *Siegel* v. *United States*, *supra*. This suit was instituted well within that time.

Judgment will accordingly be entered in favor of plaintiff for $35,491.36 with interest as provided by law. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

PERRYMAN-BURNS COAL CO., INC., A CORPORATION, v. THE UNITED STATES

[No. 42562. Decided April 5, 1937]

On the Proofs

Contract for coal; specifications as to quality; deduction from contract price for excess ash.—Where the plaintiff contracted to furnish coal to the Government the ash content of which was specified at 9 per cent, with reductions in price in case the ash exceeded by more than 2 per cent the specified 9 per cent, the Government was entitled to the specified reduction in price where the ash exceeded over 12 per cent; and it was immaterial that plaintiff prior to the execution of the contract told the Government's officials an error had been made in the bid.

The Reporter's statement of the case:

Mr. Jacob Halper for the plaintiff.

Mr. Sam M. Wassell, with whom was *Mr. William W. Scott*, *Acting Assistant Attorney General*, for the defendant.

The court made special findings of fact as follows:

On May 13, 1929, the United States invited bids to furnish coal on its Standard Form No. 30 in accordance with specifications in Schedule I, Schedule II, Standard Government Purchase Conditions for Coal, Standard Government Instructions to Bidders for Coal, and Special Instructions to Bidders. Schedule I described the kind of bituminous coal required and under the caption "analytical constituents-limits" showed that bids would be considered offering coal having a maximum ash content of 15 per cent. Schedule II was a bidding form in which the bidder filled in blanks left for itemized specifications of his bid. Plaintiff filed a bid specifying an ash content of 9 per cent in the coal which it proposed to furnish.

The defendant ordered trial shipments of the coal which plaintiff proposed to furnish and on August 13, 1929, the

Acting Director of the Bureau of Mines, by letter, informed plaintiff that it had been awarded the contract for an estimated requirement of 33,500 tons of coal under item H, for two-inch nut and slack coal from Junior No. 4 mine. This letter also advised plaintiff that an analysis of the trial shipment had disclosed an ash content of 12.5 per cent, and that therefore, in accordance with the provisions of paragraph 16 of the Standard Government Purchase Conditions, the contract price was subject to deduction of 14 cents per gross ton (being 12.5 cents per net ton), in the contract price on the tonnage represented by an analysis showing such an ash content.

On August 14, 1929, plaintiff wrote defendant stating that it did not guarantee an ash content of 9 per cent under item H, but that its proposal for two-inch nut and slack was on an ash content of 15 per cent. Under date of August 16, 1929, the Acting Director of the Bureau of Mines wrote plaintiff, enclosing a photostat sheet of schedule II on which plaintiff submitted its bid under item H, showing the 9 per cent ash content under item H.

The controversy which had thus arisen over the matter of ash content and mines finally resulted in the execution of a contract which provided that plaintiff might furnish the coal from Norton #2 and Junior #4 mines and made Schedule I and Schedule II, together with Standard Government Purchase Conditions, part of the contract. Under the Standard Government Purchase Conditions, if the percentage of the ash was shown by the analysis to be 2 per cent or more in excess of the ash content specified by the contractor, the Government could at its option either reject the coal or retain it. If retained, there was to be a reduction in price in accordance with a certain formula specified in the purchasing conditions.

The defendant elected to accept and use the coal but, in accordance with the provisions of the contract and the schedule, in making payment for the coal deducted $4,193.19. Plaintiff protested against this deduction being made and before final completion of the contract wrote the Comptroller General claiming that in stating the ash content at

approximately 9 per cent he had made an error but was advised by the Comptroller General that he must conform to his bid.

The ash content of the coal was in fact above 12 per cent and the deduction made by defendant was made in accordance with the contract and the schedules.

Subsequent to plaintiff's being advised by the Comptroller General that no relief would be granted, the plaintiff obtained a reduction of five cents a ton from the mine companies furnishing the coal which was used to fill the contract upon condition that the original price should be restored if the Government deduction were refunded.

The court decided that plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff entered into a contract with the defendant to furnish a certain quantity of coal in accordance with a bid which it had made which specified the ash content of the coal to be 9 per cent. Other specifications that accompanied the bid and which became a part of the contract provided that if the ash content exceeded by more than 2 per cent the amount specified in the bid a deduction would be made in payment for the coal in accordance with a certain formula which need not be set out here. Plaintiff furnished the coal but the ash content was found to be over 12 per cent. The defendant elected to receive and use the coal but in making payment deducted $4,193.19. The amount of this deduction was computed in accordance with the provisions with reference to ash content.

Plaintiff brings this suit to recover the amount deducted and contends—

(1) That the defendant suffered no damage;

(2) That the United States was put on notice that an error had been made in the bid;

(3) That the deviation in the ash content—9 to 12.5 per cent—was so slight as to amount to a compliance with the specifications.

These contentions are without merit. It is a matter of common knowledge that the greater the ash content the

less valuable the coal. Moreover, the contract contained, as stated above, a specific provision that a deduction should be made for ash content exceeding a certain amount. We can not disregard this provision and say that it was immaterial.

As to the last contention, it appears that plaintiff was at first awarded the contract with a different provision with reference to the mines from which the coal was to be obtained than specified in the bid but was notified that the provision with reference to excess ash would be enforced. The plaintiff could then have declined to proceed further. It did not do so, but after some controversy with defendant's officials executed a contract which included the specifications in the bid with reference to the ash content and was in accordance with the bid as to the mines. Plaintiff subsequently got a reduction in the price from the mines on the ground that the Government was going to make the deduction in controversy. We do not think the fact that plaintiff told the defendant's officials an error had been made in the bid would in any event make any difference in the validity of the contract which the plaintiff saw fit to execute afterwards, but the circumstances we have related above show that the plaintiff was treated fairly and has no grounds, either legal or equitable, for relief.

Judgment will be entered dismissing the petition.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and BOOTH, *Chief Justice*, concur.

THE GENERAL CONTRACTING AND CONSTRUCTION COMPANY, INC. v. THE UNITED STATES

[No. 42669. Decided April 5, 1937]

On the Proofs

Contract for construction of hospital buildings, etc.; elimination of part of contract; breach of contract; damages.—The elimination by the Government of a large and independent part of a Government construction contract was not a change in the

drawings or specifications of the contract within contemplation of a provision of the contract for Government "changes in the drawings and (or) specifications" of the contract, but amounted to a cardinal change or alteration of the contract itself, and constituted a breach of the contract by the Government for which the contractor was entitled to its damages resulting therefrom.

The Reporter's statement of the case:

Mr. Cooper B. Rhodes for the plaintiff. *Messrs. Fred B. Rhodes* and *Robert F. Klepinger* were on the brief.

Mr. Sam M. Wassell, with whom was *Mr. W. W. Scott, Acting Assistant Attorney General*, for the defendant. *Mr. Assistant Attorney General James W. Morris* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of the State of New Jersey, with its principal office in the City of Trenton, New Jersey.

2. On July 18, 1930, the United States Veterans' Bureau issued an invitation for bids, in which it solicited proposals for furnishing all labor and materials, and the performance of all work required for the construction and completion, at United States Veterans' Hospital, Somerset Hills, New Jersey, certain buildings and utilities, including roads, walks, grading, and drainage.

On August 16, 1930, plaintiff submitted its bid, a copy of which is hereby made a part of this finding by reference. Its bid covered seven items, to wit: "Item I—General Construction" and six alternate bids under Item I, which alternate bids were designated respectively as (a), (b), (c), (d), (e), and (f).

3. On August 20, 1930, the Veterans' Bureau, by letter, accepted plaintiff's proposal, stating:

> Acceptance is hereby made of Item I, together with Alternates (a), (b), (c), and (d) under Item I, of your proposal dated August 16, 1930, opened in this Bureau August 19, 1930.

Thereupon plaintiff and the defendant entered into a formal contract of the date of August 20, 1930, which is hereby made a part of this finding by reference. The contract, among other things, provides:

ARTICLE 1. *Statement of Work.*—The contractor shall furnish all labor and materials, and perform all work required for constructing and finishing complete, at U. S. Veterans' Hospital, SOMERSET HILLS, NEW JERSEY, two Continued Treatment Buildings, Nos. 6 and 8; one N. P. Building, No. 9; additions to Dining Hall, Building No. 3; Attendants' Quarters, Building No. 11; Nurses' Quarters, Building No. 17; two Officers' Duplex Quarters, Buildings Nos. 25 and 26; connecting corridors, Nos. 2–9, 5–6, and 8–9; and roads, walks, grading and drainage in connection with these buildings, also plumbing, heating and electrical work; outside sewer, water, steam, and electric distribution systems, and to provide a new water tube boiler and mechanical stoker in present Boiler House, Building No. 14, for the consideration of NINE HUNDRED ELEVEN THOUSAND THREE HUNDRED SEVENTY-SIX DOLLARS ($911,376.00) in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications for Construction of Buildings and Utilities for U. S. Veterans' Hospital, Somerset Hills, New Jersey, July 18, 1930, and schedule and drawings mentioned therein; Addendum No. 1 August 5, 1930, as contemplated by Item I and Alternates (a), (b), (c), and (d) under Item I of the Contractor's proposal dated August 16, 1930, and Bureau letter of acceptance dated August 20, 1930.

The work shall be commenced within Two (2) Calendar Days after date of receipt of notice to proceed and shall be completed within Three Hundred Forty (340) Calendar Days after date of receipt of notice to proceed.

4. On September 18, 1930, the Acting Director of the Veterans' Bureau advised plaintiff, by letter, that the Bureau had decided to omit from its present construction program the Nurses' Quarters, Building No. 17, and that the contract would be changed to exclude Alternate (c) under Item I of the proposal, with the understanding that a formal change order would be issued when execution of the form of contract had been completed. It was stated in the letter,

"Your prompt confirmation of this understanding will be appreciated."

On September 19, 1930, the Chief of the Construction Division of the Veterans' Bureau wrote plaintiff to proceed under the contract, excepting Nurses' Building No. 17, as described in Alternate (c) under Item I.

On October 17, 1930, plaintiff's attorney, by letter, acknowledged receipt of the letters from the Veterans' Bureau under the dates of September 18, 1930, and September 19, 1930, in which letter he stated:

> In your letter of September 19th, you notified the contractor to proceed with the construction, excepting Nurses' Building No. 17. We, of course, acknowledged receipt of this notice; * * *. This acknowledgment is made, however, without prejudice to any of the contractor's rights by reason of the change.
>
> It has been necessary for the contractor to rearrange several of its unit prices with the sub-contractors because of diminution in quantities of materials and labor required.

On January 13, 1931, the Bureau, by letter, issued a formal change order eliminating Building No. 17. The change order reads as follows:

> CHANGE ORDER "D" (Decrease), $99,520.00.
>
> With reference to your contract dated August 20, 1930, for the construction of certain buildings at U. S. Veterans' Hospital, Somerset Hills, N. J., and to Bureau letter of September 18, 1930 (copy attached), you are informed that owing to the following mentioned change in the contract work, namely:
>
> Omitting Nurses' Quarters Building No. 17, together with the Plumbing, Heating, and Electrical Work and Grading and Walks in connection with this building, being the work described in Alternate (c) under Item I of your accepted proposal dated August 16, 1930, the contract price, in accordance with Article 3 of the general provisions of the contract, is hereby decreased by the sum of Ninety Nine Thousand Five Hundred Twenty Dollars ($99,520.00). This change in contract price involves no change in time for completion.
>
> The schedule of prices should be supplemented by the notation thereon of the amount, date, and designating letter of this change order.

5. On January 15, 1931, in a letter to the Veterans' Bureau, plaintiff protested the elimination of Building No. 17. In this letter of protest plaintiff stated:

> After the change was made it was necessary for us to rearrange our relations with our sub-contractors. We naturally endeavored to make the best bargain we could, both for ourselves and for the Government.

There was then attached a compendious statement of plaintiff's estimated damages and loss of profits on account of the change, the figures of which plaintiff stated were all substantiated by documents and papers in its possession, which the Bureau was not only welcome to inspect and investigate, but was invited to do so.

On January 29, 1931, the Director of the Veterans' Bureau acknowledged receipt of plaintiff's letter of protest of January 15, 1931, in which, among other things, it was stated:

> Since the Bureau had issued a Change Order making a deduction of $99,520.00 which it considered an equitable adjustment of this matter as contemplated by Article 3 of the contract, any claim you desire to make in connection therewith is one properly for consideration by the General Accounting Office. You are, of course, privileged to submit your claim directly to the General Accounting Office for settlement, with such evidence as you believe will support such claim.

6. The plaintiff, prior to submitting its bid, had received a copy of the plans and specifications of the work to be done, including Building No. 17, which was subsequently eliminated from the contract by the defendant. In submitting its bid plaintiff estimated the quantities of material necessary and the labor required to perform the entire contract and obtained prices from proposed subcontractors for those items of material not handled by itself. Its bid for the work was predicated upon the prices thus obtained. The subcontractors' proposed prices were based on the entire work specified in the contract, including Building No. 17.

Plaintiff was notified on August 20, 1930, that its bid had been accepted and the contract awarded to it. It immediately proceeded to plan the work by purchasing necessary materials and equipment and organizing its personnel.

Upon receipt of notice that Building No. 17 would be eliminated from the contract plaintiff immediately attempted to make adjustments with its subcontractors and material men with the view of obtaining from them proportionate credits in respect to their bids. While plaintiff was able to secure satisfactory reductions from some of its subcontractors because of the elimination of Building No. 17, it was not able to do so with all of them, these subcontractors taking the position that their original prices submitted to plaintiff had been figured on the contract as a whole and that such prices became greater when Building No. 17 was eliminated.

7. On October 7, 1930, plaintiff submitted to the defendant an itemized cost sheet of the work to be performed under the contract, including Building No. 17, which cost sheet was approved by the Chief of the Construction Division of the Veterans' Bureau on October 11, 1930. In preparing the cost sheet plaintiff spread over the entire project all items of estimated expenses, including overhead and profit. Building No. 17 was apportioned a certain share of overhead and profit in proportion of its cost to the entire project. All buildings, including Building No. 17, were staked out prior to the notice of the elimination of that building, the cost of which was absorbed by plaintiff.

8. The elimination of Building No. 17 did not materially decrease the overhead and fixed costs of the entire project. In making its itemized cost sheet for the defendant the plaintiff distributed a total cost of 10% of the amount of the entire contract for overhead and anticipated profit. It distributed 4½% for overhead and 5½% for anticipated profit to Building No. 17 as its proportionate share.

9. Because of plaintiff's inability to procure from its subcontractors a reduction in their proposed contract prices commensurate with the sum deducted by the Government from plaintiff's contract because of the elimination of Building No. 17, plaintiff sustained a direct loss of $11,726.10, and as a result of the elimination of Building No. 17 it sustained a further loss of $9,046.90 in anticipated profits and overhead, making its total loss or damage because of the elimination of said building $20,773.00.

10. Plaintiff submitted to the General Accounting Office a claim for $22,418.00 as damages sustained by it because of the elimination of Building No. 17. The claim was rejected by the General Accounting Office in its entirety.

The court decided that plaintiff was entitled to recover.

WILLIAMS, *Judge*, delivered the opinion of the court:

The plaintiff and the defendant, represented by L. H. Tripp, Chief of the Construction Division of the U. S. Veterans' Bureau, entered into a contract on August 20, 1930, whereby plaintiff agreed to furnish all labor and materials, and perform all work required, for constructing and finishing complete, at U. S. Veterans' Hospital, Somerset Hills, New Jersey, certain buildings, connecting corridors, and roads, walks, grading, and drainage in connection with these buildings, also plumbing, heating, and electrical work; outside sewers, water, steam, and electric distribution systems, and to provide a new water tube boiler and mechanical stoker in the present Boiler House, Building No. 14, for the consideration of $911,376.00. The work was to be performed in accordance with the specifications, schedules, and drawings furnished by the defendant, all of which were made a part of the contract.

On September 18, 1930, plaintiff received a letter from the Acting Director of the Veterans' Bureau stating that upon reconsideration it had been decided to omit from the present construction program the Nurses' Quarters Building No. 17, together with the work pertaining to that building as described in Alternate (c) under Item I of plaintiff's proposal, and advised plaintiff that a formal change order would be issued when the execution of the form of contract had been completed. On September 19 plaintiff was notified by the Chief, Construction Division, U. S. Veterans' Bureau, to proceed with the construction of the buildings and utilities contemplated by the contract of August 20, 1930, excepting Nurses' Quarters Building No. 17. Plaintiff was also notified at the same time that its surety bond had been approved and placed on file with the Bureau record of the contract.

Opinion of the Court

On January 13, 1931, the contracting officer issued a formal change order under Article 3 of the contract eliminating from the contract Nurses' Quarters Building No. 17, and by reason of such change decreased the contract price by $99,520.00.

Plaintiff had previously, in acknowledging receipt of the defendant's letter of September 19, 1930, directing it to proceed with the work under the contract "excepting Nurses' Quarters Building No. 17", stated that the acknowledgment was made "without prejudice to any of the contractor's rights by reason of the change." Now, upon receipt of the formal change order omitting Building No. 17 from the contract and deducting $99,520.00 from the contract price by reason of such change, plaintiff, within the time in which it was permitted to do so under Article 3 of the contract, protested the deduction of $99,520.00 from the contract price because of the omission of Building No. 17 and filed with its protest voluminous proof tending to show that the deduction of that amount was excessive and inequitable, resulting in loss and damage to it, claim for which was made. The Director of the Veterans' Bureau in acknowledging receipt of plaintiff's protest and claim for loss and damages sustained by it by reason of the change order stated: "Since the Bureau had issued a change order making a deduction of $99,520.00 which it considered an equitable adjustment of this matter as contemplated in Article 3 of the contract, any claim you desire to make in connection therewith is one properly for consideration by the General Accounting Office."

Prior to the time plaintiff received notice on September 19, 1930, to proceed with the work under the contract, "excepting Nurses' Quarters Building No. 17", it had received from subcontractors prices for the furnishing of those items of materials necessary to the work not handled by itself. The unit prices for these materials proposed by the subcontractors were based on the amount of such materials required for the completion of the contract as a whole. Upon the elimination of Building No. 17 plaintiff took up with its subcontractors negotiations for contracts covering the materials required for the work, omitting Building No. 17, and found

that its subcontractors in the main would not enter into the contracts for the materials to be furnished by them at the unit prices quoted in their proposals. Plaintiff was therefore required to enter into contracts with its subcontractors for the materials to be furnished by them at higher prices than the unit prices offered by them for the materials necessary for the completion of the contract as a whole. The Commissioner of the court, to whom the case was referred for the taking of proof and reporting of facts, heard testimony offered by plaintiff in respect to the loss and damage sustained by it because of its inability to procure from subcontractors reduction of their proposed contract prices to an amount commensurate with the sum ($99,520.00) deducted by the Government from plaintiff's contract because of the elimination of Building No. 17 and because of loss of profits and overhead. The Commissioner found and reported to the court that plaintiff had suffered damages to the extent of $20,773.00. The defendant offered no proof in respect to the alleged loss and damage caused plaintiff by the elimination of Building No. 17, and took no exceptions to the report of the Commissioner fixing the amount of such damage at $20,773.00. We find, upon a careful review of the evidence heard by the Commissioner of the court, that plaintiff's loss as fixed by him is amply supported by the proof, and have made a finding of fact that because of the elimination of Building No. 17 from the contract plaintiff sustained loss and damage to the extent of $20,773.00.

The defendant does not challenge the finding that plaintiff has sustained loss and damage to the extent of $20,773.00 because of the elimination of Building No. 17, but rests its case entirely on the assumption that the elimination of Building No. 17 was a change in the drawings and specifications of the contract within the meaning of Article 3 of the contract, and that the decision of the Director of the Veterans' Bureau that a deduction of $99,520.00 from the contract price, the amount fixed by the contracting officer in the change order, was an equitable adjustment of the matter, is final and conclusive under Article 15 of the contract.

Article 3 of the contract provides:

Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 15 of the contract provides:

Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

Article 3 of the contract is a standard form used by the Government in all construction contracts. Its purpose is to enable the contracting officer to make any change in drawings and specifications he may find necessary or desirable as work under the contract progresses. It has reference, we think, entirely to structural changes like the substitution of one kind of material for another, changes in architectural design, the addition to or subtraction from work required by the specifications, etc. Certainly the authority vested in the contracting officer by this article of the contract to make "changes in the drawings and (or) specifications of this contract and within the general scope thereof" did not vest him

with authority to eliminate entirely from the contract Building No. 17. If he could eliminate one building from the contract under the guise of making changes in the drawings and specifications he could likewise eliminate two or any number of buildings and thus entirely change the contract. The elimination of Building No. 17 amounted to a cardinal change or alteration of the contract itself, a thing that could only be consummated with the consent of both parties to the contract. The elimination of Building No. 17 from the work to be performed under the contract without the consent of plaintiff was a plain breach of the contract by the defendant.

The defendant having breached the contract plaintiff is entitled to recover its damages arising therefrom, and judgment is therefore awarded plaintiff in the sum of $20,773.00.

It is so ordered.

WHALEY, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

JAMES T. McMILLAN, TRUSTEE, ESTATE OF JAMES McMILLAN v. THE UNITED STATES

[No. 42839. Decided April 5, 1937]

On the Proofs

Income tax; deductible loss; discretionary action of Commissioner to stand in absence of abuse of discretion.—Where the plaintiff, the trustee of an estate, failed until December 1931, to write off on the books of the estate losses in 1929 on bonds held by the estate, or to claim deduction of such losses in determining net income of the estate until the filing of a claim for refund in February 1932, based on allowance of deduction of such losses for 1929, the disallowance of such deduction and claim by the Commissioner of Internal Revenue, in view of the discretionary provisions of section 23 (j) of the Revenue Act of 1928, should not be reversed by the court in the absence of abuse of discretion on the part of the Commissioner.

The Reporter's statement of the case:

Mr. Frederick O. Graves for the plaintiff. *Miller & Chevalier* were on the briefs.

Mr. Guy Patten, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant. *Mr. Assistant Attorney General Robert H. Jackson*, and *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

The court made special findings of fact as follows:

1. Plaintiff, James T. McMillan, is a citizen of the United States and a resident of Detroit, Michigan, and is, and at all times hereinafter mentioned was, a trustee of the estate of James McMillan, deceased.

2. On March 17, 1930, plaintiff filed his Federal income tax return for the calendar year 1929, on behalf of the Estate of James McMillan, with the Collector of Internal Revenue at Detroit, Michigan, disclosing therein a gross income of $303,817.14, deductions none, and net income of $303,817.14, taxable at capital gain rates and an income tax liability thereon of $37,977.14. The tax so disclosed was paid by plaintiff during the year 1930, as follows: on March 17th $9,494.29, on June 17th $9,494.29, on September 16th $9,494.28 and on December 16th $9,494.28.

3. Thereafter, upon audit of the income tax return, the Commissioner of Internal Revenue assessed an additional tax against plaintiff for the year 1929 in the amount of $1,945.47, based upon certain adjustments, including $15,-563.75 net increase to income. Plaintiff paid the additional tax, together with interest thereon in the sum of $160.43, on October 17, 1931. The additional tax was assessed at capital gain rates.

4. On February 29, 1932, plaintiff filed with the Collector of Internal Revenue a claim in which he asked for the refund of $1.00 or more upon the ground that:

> The taxpayer owned during 1929 and still owns bonds of Detroit, Jackson and Chicago Railway Company and Detroit and Port Huron Shore Line Railway Company

on which relatively heavy losses have occurred due to the lines having been abandoned. It may be that the Treasury Department may eventually decide that these losses should have been claimed by the taxpayer in its tax return for the year 1929, and this claim is, therefore, filed to protect the interest of the taxpayer. The taxpayer's return for the year 1929 was signed by the trustee, James T. McMillan, who is still acting.

The claim for refund was rejected by the Commissioner of Internal Revenue on a schedule dated November 1, 1932, and plaintiff was duly notified of the rejection on the date.

5. Throughout the year 1929 the Estate of James McMillan owned First Mortgage 5% Gold Bonds of Detroit and Port Huron Shore Line Railway Company of a par value of $25,000.00, due January 1, 1950, which had been acquired during the years 1916 and 1919 at a total cost of $23,150.

Detroit and Port Huron Shore Line Railway Company is a corporation which was organized in 1898 under the laws of the State of New York. On January 1, 1900, this railway company issued its 50-year First Mortgage 5% Gold Bonds, dated January 1, 1900, and due January 1, 1950. The total amount of such bonds issued and outstanding throughout the years 1929 and 1930 was $2,499,000, and this was the total outstanding bond indebtedness of such company.

The Detroit and Port Huron Shore Line Railway Company was placed in receivership in 1925. Shortly thereafter a Bondholders' Protective Committee was formed by the bondholders to protect their interests. The aforesaid bonds of the Estate of James McMillan were deposited with the Committee on October 21, 1925.

On or about June 1, 1929, the Bondholders' Protective Committee adopted a plan for reorganizing the Detroit and Port Huron Shore Line Railway Company in connection with the Eastern Michigan Railway, a corporation which was organized in September 1928, and which took over most of the net assets and properties which had been owned and operated by the Detroit United Railway Company. On December 13, 1929, the plan was abandoned at a meeting of the Bondholders' Protective Committee, at which time an appraisal of the assets of Detroit and Port Huron Shore Line Railway Company was submitted to the Committee

by A. L. Drum, President of Eastern Michigan Railway. In the appraisal so submitted, it was recommended that operation of the railroad be discontinued and that the assets be disposed of. The appraised value of the assets, as shown in the Drum report, was $1,060,000, and the estimated cost of completing foreclosure, and the estimate of receiver's accounts as of December 31, 1929, shown in the report, was $264,115, leaving an estimated net salvage value of $795,885, or $318 per $1,000 bond to participating bondholders.

On December 20, 1929, a decree of foreclosure of the mortgage securing the bonds of Detroit and Port Huron Shore Line Railway Company and an order of sale of all the railway company's assets was entered by the United States District Court for the Eastern District of Michigan, Southern Division. On January 24, 1930, the assets were sold pursuant to the decree of foreclosure and order of sale and were purchased by the Bondholders' Protective Committee for $300,000. The sale was approved by the Court on January 25, 1930. The sale price permitted non-participating bondholders to realize $67.04 for each $1,000 bond that they held, which amount by order of distribution dated May 15, 1930, was credited to each $1,000 bond. The money used to retire the non-participating bondholders' bonds was secured by the Committee from a sale of the rolling stock and personalty of the railway company property purchased by it. The estimated amount which the participating bondholders expected to realize from a resale of the real estate purchased was $700,000, or $318 for each $1,000 bond they had deposited with the Committee. This estimate was based upon the appraisal heretofore referred to.

On December 30, 1931, there was written off on the books of the Estate of James McMillan as a loss on account of these bonds the sum of $18,150, which included the sum of $15,200 here claimed as a loss in 1929. No part of this amount was allowed by the Commissioner of Internal Revenue as a deduction from gross income in computing the tax liability of plaintiff for the year 1929, or for the year 1930, and was not claimed or allowed for 1931.

6. Throughout the year 1929 the Estate of James McMillan owned Consolidated Martgage 5% Gold Bonds of Detroit, Jackson and Chicago Railway Company of a par value of

$10,000.00, due February 1, 1937, which had been acquired in 1916 at a cost of $9,150.00.

Detroit, Jackson and Chicago Railway Company is a corporation organized under the laws of the State of Michigan as the successor of Detroit, Ypsilanti, Ann Arbor and Jackson Railway Company, which in turn succeeded Detroit, Ypsilanti and Ann Arbor Railway Company. On February 1, 1907, Detroit, Jackson and Chicago Railway Company issued its 30-year Consolidated Mortgage 5% Gold Bonds, dated February 1, 1907, and due February 1, 1937. The total amount of such bonds issued and outstanding throughout the years 1929 and 1930 was $2,060,000.00. The mortgage which secured these bonds was a third lien on certain of the properties of the Railway Company, a second lien on certain other properties and a first lien on still other properties. The bonded indebtedness of the Railway Company outstanding in 1929 and having priority over these particular bonds amounted to $1,940,000.00.

The Detroit, Jackson and Chicago Railway Company was placed in receivership in 1925. Shortly thereafter a Bondholders' Protective Committee was formed by the bondholders to protect their interests. The aforesaid bonds of the Estate of James McMillan were deposited with the Committee on October 21, 1925.

In 1929 the assets of Detroit, Jackson and Chicago Railway Company which were covered by the senior liens were disposed of and nothing was received from the disposition of such assets which was available to the holders of the 5% 30-year bonds due in 1937. Thereafter, in 1929, operations of Detroit, Jackson and Chicago Railway Company were suspended by authority of the United States District Court.

The bondholders estimated that the balance of the assets owned by the Railway Company in 1929 available to the holders of the 5% 30-year bonds would not exceed $75,000.00, and because of the small value of assets there were no foreclosure proceedings.

On December 30, 1931, there was written off on the books of the Estate of James McMillan as a loss on account of these bonds the sum of $7,150.00, which is the amount claimed herein as a loss in 1929. No part of this amount was allowed by the Commissioner of Internal Revenue as

a deduction from gross income in computing the tax liability of plaintiff for the year 1929 or the year 1930, and was not claimed or allowed for 1931.

7. Plaintiff was at all times herein mentioned thoroughly familiar with the status of Detroit and Port Huron Shore Line Railway Company and Detroit, Jackson and Chicago Railway Company, and with the bonds of these companies, and with the foreclosure sale of the properties of the Detroit and Port Huron Shore Line Railway Company herein mentioned.

The court decided that plaintiff was not entitled to recover.

Williams, *Judge*, delivered the opinion of the court:

The plaintiff, trustee of the estate of James McMillan, deceased, seeks to recover the sum of $2,793.50, with interest thereon, Internal Revenue taxes alleged to have been overpaid for the calendar year 1929. The facts have been stipulated by the parties and the only question involved is whether the Commissioner of Internal Revenue erred in disallowing a deduction of $15,200 claimed by plaintiff as a partial loss on First Mortgage Bonds of the Detroit and Port Huron Shore Line Railway Company, and $7,150 loss in respect to bonds of the Detroit, Jackson and Chicago Railway Company, which bonds plaintiff claims were ascertained to be partially worthless, to the extent of the deduction claimed, during the taxable year, and charged off.

The applicable statute is section 23 (j) of the Revenue Act of 1928, which reads:

> In computing net income there shall be allowed as deductions:
>
> (j) Bad debts.—Debts ascertained to be worthless and charged off within the taxable year (or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part.

Plaintiff in his tax return for the year 1929 made no claim for deduction from income on account of the partial worthlessness of the bonds involved, and there was written off on the books of the estate of James McMillan no loss

on account of the worthlessness or partial worthlessness of the bonds until December 31, 1931, on which date $18,500 was written off as a loss on account of the bonds of the Detroit and Port Huron Shore Line Company, which loss includes the sum of $15,200 here claimed as deduction for 1929. On the same date there was written off the books of the estate a loss of $7,150 in respect to the bonds of Detroit, Jackson and Chicago Railway Company, which loss is also here claimed for the year 1929. These charge-offs were for the entire loss sustained by plaintiff in respect to the bonds in question.

In addition to the fact that plaintiff did not claim the deductions now sought for the year 1929 in his tax return for that year, and did not charge off on the books of the estate such partial bad debt losses during that taxable year or within a reasonable time after the close of business for the year, there is nothing in the record to indicate that plaintiff at any time during the year 1929 had ascertained or even estimated the amount of his loss attributable to the fact that the bonds were recoverable only in part or that he had decided to take a partial loss in respect to them for that year. In the claim for refund filed shortly after plaintiff, on December 31, 1931, charged off his entire loss on account of the bonds, plaintiff stated:

> The taxpayer owned during 1929 and still owns bonds of Detroit, Jackson and Chicago Railway Company and Detroit and Port Huron Shore Line Railway Company on which relatively heavy losses have occurred due to the lines having been abandoned. It may be that the Treasury Department may eventually decide that these losses should have been claimed by the taxpayer in its tax return for the year 1929, and this claim is, therefore, filed to protect the interest of the taxpayer. The taxpayer's return for the year 1929 was signed by the trustee, James T. McMillan, who is still acting.

Manifestly this claim is for the total loss on the bonds as shown by the charge-offs on December 31, 1931, and not for the partial loss now asserted for the year 1929. The purpose of the claim was to protect the taxpayer in case the Department should decide that the losses charged off

should have been claimed by the taxpayer in his tax return for the year 1929, and was in no way an assertion by plaintiff that the losses now claimed should be deducted from income for that year. In fact, there is nothing in the entire record of the case to show, or indicate, that plaintiff, at any time prior to the filing of the petition on October 30, 1934, asserted the right to have the partial losses in respect to its bonds in the amount claimed deducted from income for the taxable year 1929.

In view of the facts disclosed, it can not be said that the Commissioner acted arbitrarily or abused the discretion vested in him in section 23 (j) of the Revenue Act of 1928 in disallowing plaintiff's claim for refund. In the absence of the abuse of discretion on the part of the Commissioner in rejecting the claim the court would not be justified in reversing his decision. *Boyle Valve Co.* v. *United States*, 69 C. Cls., 129; 38 Fed. (2d), 135; *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S., 386; *Art Metal Construction Co.* v. *United States*, decided January 11, 1937, *ante*, p. 312. Plaintiff is not entitled to recover, and the petition is dismissed.

It is so ordered.

Whaley, *Judge;* Littleton, *Judge;* Green, *Judge;* and Booth, *Chief Justice*, concur.

GLOBE INDEMNITY COMPANY AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND v. THE UNITED STATES

[No. 42862. Decided April 5, 1937]

On Demurrer to Plea in Bar

Subrogation; rights under.—The party for whose benefit the doctrine of subrogation is exercised can acquire no greater rights than those of the party for whom he is substituted; the doctrine was never intended to be used as an instrument to circumvent the principles of equity and permit a subrogee to be placed in a more advantageous position than the party from whom his rights devolved.

Opinion of the Court

Forfeiture of claim against the Government; scope of forfeiture; right of action; subrogation.—Section 172 of the Judicial Code (U. S. Code, title 28, section 279), providing for forfeiture of claims against the Government for fraud in their prosecution, not only forfeits the entire claim growing out of the transaction upon which it is founded and bars the claimant and those who may claim under him, but it destroys the right of action of the principal claimant and every person claiming by right of subrogation directly based upon the transaction out of which the claim arose.

Subrogation of surety for contractor; forfeited claim against the Government.—The surety of a contractor can acquire by subrogation no greater rights under the contract than those of the contractor himself; and where a claim by a contractor against the Government for breach of contract was forfeited for fraud by the contractor in its prosecution, the fraud vitiated and nullified not only all rights of the contractor in the claim, but also of those claiming under and through him or his contract.

The Reporter's statement of the case:

Mr. Horace S. Whitman for the plaintiffs. *Mr. Washington Bowie, Jr.*, was on the brief.

Mr. Percy M. Cox, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

The facts sufficiently appear from the court's opinion.

LITTLETON, *Judge*, delivered the opinion of the court:

December 27, 1927, plaintiffs became sureties on a contract of December 7, 1927, between Charles A. Blume and the United States for the construction of certain buildings at Pearl Harbor, T. H.

Blume ceased work under his contract February 1, 1929, before the buildings were completed, and their construction was completed by the United States. In October 1929 Blume brought suit in this court alleging breach of contract by the United States and seeking to recover damages in the amount of $297,930.49. During prosecution of that case a plea of fraud was filed by the United States under section 172 of the Judicial Code. After the introduction of proof by both parties and a hearing, the court sustained the plea that Blume had committed fraud against the

United States in the prosecution of the case and entered judgment forfeiting all claims under Blume's contract with the United States in accordance with section 172 of the Judicial Code, U. S. Code, title 28, section 279. The motion of these plaintiffs to intervene in that proceeding for the purpose of seeking to recover a certain amount to which they claimed to be entitled, because of certain matters hereinafter more fully stated arising and growing out of Blume's contract with the United States, was denied and this suit was later instituted. In this suit plaintiffs, as sureties on Blume's contract, seek to recover $77,638.65. They paid this amount in settlement of suits against Blume for certain labor and materials furnished to Charles A. Blume. The defendant has filed a special answer and plea in bar praying that the petition be dismissed for the reason that it is predicated upon the same subject matter of the Blume claim which had previously been declared and adjudged to be forfeited to the Government of the United States and forever barred from the jurisdiction of this court. Plaintiffs demur to the plea in bar on the ground that the matters pleaded therein do not constitute a good defense to their cause of action. For the purpose of the demurrer and the plea in bar, the pertinent facts are as follows:

December 7, 1927, Charles A. Blume entered into a contract with the United States through the Chief of the Bureau of Yards and Docks for construction of a barracks, a subsistence building, a laundry, and a boilerhouse at the Naval Operating Base at Pearl Harbor, T. H., in compliance with specifications 5407 and amendments thereto, all of which are attached to the petition herein as Exhibit A and are made a part hereof by reference. Thereafter on December 27, 1927, in compliance with the statute relating to Government contracts (Hurd Act, U. S. Code, title 40, section 270), Blume, as principal, and the Globe Indemnity Company and The Fidelity and Deposit Company of Maryland, as sureties, gave bond for faithful performance by Blume in the undertaking and payment by him for labor and materials on the proposed construction work, all of which more fully appears from a copy of the bond attached

to the petition herein as Exhibit B and made a part hereof by reference. The bond was accepted and approved by the defendant.

Blume, the contractor, began work under his contract with the United States in February 1928. February 1, 1929, long after the dates allowed and granted for completion of the work Blume abandoned further performance of the contract and thereafter refused and failed to carry on and complete the work required thereunder. Thereafter the contract work was carried on and completed by the Navy Department at great expense and cost to the United States by the purchase of the necessary building materials and the employment of its own construction engineers and technical staff, and hired mechanics and laborers. The record herein does not definitely show just when the work was completed by the United States, but for the purpose of this opinion it is found that it was completed by the Government on or shortly prior to May 21, 1930. The total contract price as modified, specified in the contract between Blume and the United States, was $445,815.41.

Prior to the abandonment of the contract by Blume, the Navy Department made payments to him from time to time as the work progressed, as provided by the contract, and on January 7, 1929, the date of the last progress payment made to Blume, the aggregate of such progress payments was $314,666.16. The cost to the Government of completing the work upon Blume's abandonment of the contract was $89,123.49. In addition Blume was charged with penalties for delay amounting to $12,715. The difference between the total contract price and the amount paid to Blume before his abandonment of the contract, plus the cost of completion and penalties for delay, was $29,310.76. Upon receipt from Blume of notice on February 1, 1929, of his abandonment of the contract and of the work required thereunder, the Navy Department made no further payments to him for materials, supplies, and labor performed since the date of the last progress payment and ceased making any further payments after his refusal and failure to proceed with the work.

Opinion of the Court

It does not appear what amount, if any, in excess of progress payments made was due Blume for work performed and materials furnished to the date of his abandonment of the contract. Art. I of Blume's contract of December 7, 1927, obligated the contractor, among other things, to furnish all labor and materials and perform all work required for constructing and erecting the barracks, a subsistence building, a laundry and boiler house, and completing the construction of said buildings within a certain specified time. Blume did not furnish all labor and materials for this purpose and did not in fact complete the construction of the buildings but he abandoned the work on February 1, 1929, as hereinbefore stated.

October 29, 1929, Blume, the contractor, instituted suit in this court to recover damages from the United States, alleging breach by the Navy Department of the contract entered into between him and the Chief of the Bureau of Yards and Docks, December 7, 1927. December 7, 1929, the United States filed an answer to this petition denying each and every allegation thereof. An amended petition was filed March 5, 1931, alleging damages of $282,472.02, to which the defendant filed a general denial.

In November 1930 the American Factors Co., Ltd., who had furnished certain materials to Blume for use in the construction work performed by him under his contract with the United States, instituted suit under the Hurd Act, U. S. Code, title 40, section 270, in the United States District Court of Hawaii against Blume as principal and plaintiffs as sureties on Blume's bond to recover the sales price of such materials so furnished to Blume for which he had not made payment. Soon thereafter other creditors of Blume intervened in that suit and were made parties thereto, as provided by the Hurd Act. As a result of these suits plaintiffs, as sureties for Blume, paid $58,834.48 in October 1931 and $18,804.27 in September 1932, totaling $77,738.75, in settlement of the claims for labor and materials furnished to Blume for use in connection with his contract with the United States.

After issue was joined and the suit instituted in this court by Blume both he and the defendant called and

examined numerous witnesses and introduced into the record a large amount of documentary evidence and proof on the issue of fraud raised and joined in the pleadings. Among other documents offered in evidence by Blume in the proof or establishment of the claims growing out of the contract between him and the United States was a cash book purporting to record cash disbursements made by him in connection with the work which he had performed under the contract of December 7, 1927. This cash book was duly received in evidence and made plaintiffs' exhibit 239, part 3. While this cash book was in the custody of the court as an exhibit and as part of the proof in the case, Charles A. Blume, with the object and for the purpose of misleading and deceiving the court, did between January 20 and February 29, 1932, corruptly alter, change, and falsify certain of the original entries in this cash book with intent to defraud the United States as to proof, statement, establishment, or allowance of the claims arising and growing out of the contract of December 7, 1927, between him and the United States.

April 11, 1932, immediately following the discovery of such changed and falsified entries, the United States filed a special answer and plea of fraud under section 172 of the Judicial Code, U. S. Code, title 28, section 279. A true copy of such special answer and plea of fraud is attached to the plea in bar herein and is made a part hereof by reference. Issue was joined upon the plea and proof was taken thereon by both parties.

During the hearings on the defendant's plea of fraud, plaintiffs sought to intervene and to file an intervening petition for the purpose of setting up, as sureties on the performance bond of Blume, their asserted rights as subrogees to recover from the United States the amount here involved, notwithstanding any forfeiture of the claim or claims growing out of the contract of December 7, 1927, which thereafter might be declared, decided, and adjudicated by the court. The motion of plaintiffs to intervene was denied.

November 5, 1934, this court sustained the plea of fraud, 81 C. Cls. 210, and entered a judgment forfeiting the entire claim made in that suit to the United States, which claim

was based on and grew out of the contract of December 7, 1927. A true copy of the findings of fact, conclusion of law, judgment, and opinion of the court is attached to the plea in bar herein as Exhibit 3 and is made a part hereof by reference.

In view of the facts herein and the provisions of section 172 of the Judicial Code, we are of opinion that plaintiffs cannot recover. Their claim is based upon and grows out of the contract of December 7, 1927, between Blume and the United States, and is a part of the claim forfeited to the United States by the judgment of this court. Basically their right to recover rests upon the doctrine of subrogation to the rights of Blume.

Section 172 of the Judicial Code, U. S. Code, title 28, section 279, provides that when any person corruptly practices or attempts to practice a fraud against the United States in connection with any claim, or any part of a claim, against the United States, it shall be the duty of the court to find specifically that such fraud was practiced, or attempted to be practiced, "and thereupon give judgment that such claim is forfeited to the Government" and that the claimant be forever barred from prosecuting the same. The language of this section is very broad and we construe it to apply to the whole of any claim arising out of any contract or cause of action in connection with which any person before the court as a claimant therein corruptly practices or attempts to practice a fraud against the United States in the proof, statement, establishment, or allowance of a claim or any part thereof and not merely to the forfeiture to the Government of the interest of the particular claimant who practices the fraud or to his right further to prosecute the same. In other words, the statute not only forfeits the entire claim growing out of the transactions upon which it is founded and bars the claimant and those who may claim under him, but it destroys the right of action of the principal claimant and every person claiming by right of subrogation directly based upon the transaction or transactions out of which the claim arose—in the case at bar, the contract of December 7, 1927. The section was designed to afford the Government an effective

means of defeating and forever ending actions based on fraudulent claims. This section, in effect, withdraws the consent of the United States to be sued upon any contract or transactions in connection with which any claimant has practiced or attempted to practice fraud. The provision forfeiting any claim in connection with which fraud is practiced was enacted in 1863. It becomes a part of every contract with the United States. Sureties, as well as contractors, are charged with notice of possible forfeiture to the United States of the whole of any claim in connection with which fraud is practiced and of the forfeiture, as well, of any cause of action based upon the contract of the person committing the fraud. The main purpose of the statute is to penalize not only the contractor for what amounts to a crime against the United States but every one holding under him or succeeding to his rights, or basing any claim against the United States upon the transactions involved in the claim or upon the contract in connection with which the fraud was committed.

In the case of *Blume* v. *United States*, *supra*, in discussing the motion of these plaintiffs to intervene, the court said:

> * * * Under the statute the charge of fraud went to the whole of plaintiff's claim, and plaintiff's sureties on his bond to the United States had no greater right than plaintiff with respect to any claim arising under the contract. Under the court's finding that the acts of the plaintiff in this suit brought about a forfeiture of the entire claim, there is left in the case no subject matter with respect to which the sureties may intervene.

Although the court was there discussing the right of plaintiffs to intervene before the judgment of forfeiture was entered, we think what was said applies with equal force to the right of plaintiffs to maintain a separate suit based upon Blume's contract with the United States. Plaintiffs contend that they have a legal right to maintain this action and to recover from the United States amounts paid in settlement of suits against Blume for materials and labor furnished him during his performance of the contract with the United States under the doctrine of subrogation or substitution, not to the rights of Blume the principal but

Opinion of the Court

to the rights of the United States to any funds that might have been due Blume by the United States under the contract between him and the United States, except for the fraud committed by Blume; that the rights of plaintiffs are contractual and the realization of them depends upon the doctrine of subrogation by law as the equitable owner of any funds in the hands of the United States which the United States might have used to complete the contract upon Blume's default; that Blume may have assigned or forfeited his right against the United States but the assignment or forfeiture of rights reached only his interest or right to prosecute the claim against the United States and cannot affect the established rights of the sureties.

Sureties on a Government contract are in contractual relationship with the United States only through the contract of their principal and while in a proper case they may be subrogated to the rights of the United States to any funds or securities in its hands due the contractor under the contract, or which it might use for any legitimate purpose under the contract, such as the payment of claims for materials or labor, or for completion of the contract upon default of the principal, such right of the surety to lay claim against the Government to such fund or securities arises only by reason of their subrogation initially to the rights of the principal, the contractor, with the United States. In other words, plaintiffs' right to recover any amount from the United States is and must be based upon Blume's contract. The party for whose benefit the doctrine of subrogation is exercised can acquire no greater rights than those of the party for whom he is substituted. The doctrine of subrogation was never intended to be used as an instrument to circumvent the principles of equity and by circuitous action to permit the assignee to be placed in a more advantageous position than the assignor from whom his rights devolved. The fraud committed by Blume was not personal, affecting him alone in the forfeiture. As in equity generally the fraud vitiated and nullified all rights of Blume and those who succeeded to any right that he may have had but for the fraud, and those who claim under and

Syllabus

through him or his contract. Any other conclusion would open the door for collusion and more fraud and, by indirection, defeat the general object of the statute.

If it be assumed that prior to the fraudulent acts of Blume the United States might have been liable for an amount in excess of that specified in the contract, by reason of the extra work and changes, and that the Government, upon the abandonment of the contract by Blume, completed the work at a cost which was less than the contract price, any fund arising from such sources is not a trust fund and the United States does not here stand in the position of a stakeholder of an amount admittedly due. On the contrary, any fund which, but for the forfeiture, might be considered as a trust fund against which the sureties might claim was completely forfeited to the United States and any cause of action with respect thereto was wiped out by law and the judgment of this court. Inasmuch as the subject matter and the remedy have been destroyed by operation of law, there is nothing left on which the doctrine of subrogation, either to the rights of the principal contractor or the right of the Government, may operate, or upon which plaintiffs can maintain a suit on any theory of an implied contract on the part of the Government to pay.

The demurrer is overruled and the plea in bar is sustained. The petition is, therefore, dismissed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge*, and BOOTH, *Chief Justice*, concur.

NIGHT HAWK LEASING COMPANY v. THE UNITED STATES

[No. 42878. Decided April 5, 1937]

On the Proofs

Income tax; filing of refund claim with collector.—Refund claims, whether formal or informal, are not required to be filed with the Commissioner of Internal Revenue; a claim that would be good if filed with and accepted by the Commissioner is good if filed with and accepted by the collector.

Reporter's Statement of the Case

Informal claim for refund.—A written document constituting a demand, on proper grounds, for the return of money paid by the taxpayer, when accepted as such by the collector of internal revenue, is sufficient to constitute an informal claim for refund.

Same.—Where the taxpayer had appeals pending before the Board of Tax Appeals from proposed income tax deficiencies for the years 1923–1927, and upon demand, and under protest based on the same grounds as its appeals before the Board of Tax Appeals, paid the collector by check additional taxes for 1928 and 1929, indorsing on the back of each check, "This check is accepted as paid under protest pending final decision of the higher courts", and the checks were accepted and indorsed by the collector under such indorsements thereon, such indorsements by the taxpayer constituted informal refund claims which could properly be completed prior to final action thereon by the Commissioner of Internal Revenue.

The Reporter's statement of the case:

Mr. George E. H. Goodner for the plaintiff.

Mr. J. W. Blalock, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

Plaintiff overpaid its income tax and interest for 1928 in the amount of $4,759.73 and for 1929 in the amount of $2,027.93. It seeks to recover these amounts, totaling $6,787.66, the refund of which the Commissioner of Internal Revenue denied on the ground that no sufficient claim for refund therefor had been made within the time allowed by law.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, an Arizona corporation, was, from a date prior to 1923 to sometime in 1929, engaged under a lease in mining copper from what is known as Fraction No. 1 Claim.

2. In its income tax returns for 1923 to 1929, inclusive, plaintiff took depletion deductions in respect to the copper mined and sold each year from that claim at the rate of 3 cents a pound. Prior to 1928 the Commissioner of Internal Revenue had disallowed these deductions for the years 1923, 1924, and 1925, and, on January 18, 1928, plaintiff

appealed from such action to the United States Board of Tax Appeals. The Commissioner likewise disallowed similar deductions which had been taken in plaintiff's returns for 1926 and 1927, and, on July 25 and November 6, 1929, respectively, plaintiff appealed to the Board from such disallowances. Shortly prior to the issuance of the deficiency notice for 1927, from which the foregoing appeal was taken, plaintiff on August 31, 1929, wrote the following letter to the Commissioner:

> Your letter of August 22, 1929, is here with the regular notice of deficiency of income tax for the year 1927 and we are acknowledging receipt of same as per your request.
>
> Since it is our decision to place this controversy in the U. S. Court of Tax Appeals, along with the years 1923, 1924, 1925, and 1926, we would advise that you hurry your final notice so that we could include the year 1927 with the others. The same dispute will come up over the years 1928 and 1929 and we are anxious to have these treated in the same way.
>
> Our Company have lost the lease due to expiration as of June 30, 1929, and have ceased mining operations. The cash funds are held in the bank pending a settlement of the income tax problem and we would sincerely ask that you take whatever steps are necessary to hasten this settlement so that we could close our account with the stockholders as soon as possible.
>
> We would appreciate if this case could be brought before the Court immediately so that we could make proper settlement with the many stockholders of this Company.

3. The Board consolidated the three appeals mentioned in finding 2 for hearing and decision. March 13, 1930, the Board promulgated its findings of fact and opinion (19 B. T. A. 258), wherein it sustained the action of the Commissioner, and on March 14, 1930, entered its decisions in accordance therewith.

Plaintiff duly appealed from the decisions of the Board and March 14, 1932, the Court of Appeals of the District of Columbia reversed the Board's action for the years 1923 to 1927, inclusive, holding that plaintiff was entitled to take depletion deductions based on the copper mined from the Fraction No. 1 Claim each year computed at 3 cents a pound.

July 21, 1932, the Board entered its final orders in accordance with the court's mandate, and October 19, 1932, the Treasury Department mailed its check in refund of overpayments for 1923 to 1927, inclusive.

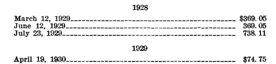
4. In its returns for 1928 and 1929 plaintiff took depletion deductions on the copper mined and sold from Fraction No. 1 Claim as follows:

Year	Pounds copper	Rate	Depletion deductions
1928	1,156,481.63	3¢	$34,694.45
1929	688,547	3¢	20,656.41

The net income and tax disclosed by these returns were as follows:

Year	Net income	Tax
1928	$15,301.75	$1,476.21
1929	3,679.58	74.75

The taxes were paid by plaintiff as follows:



1928

March 12, 1929	$369.05
June 12, 1929	369.05
July 23, 1929	738.11

1929

April 19, 1930	$74.75

5. In 1930 a revenue agent made an examination of plaintiff's records for 1928 and 1929 in connection with its returns for those years, and July 16, 1930, made a report wherein he recommended disallowance of depletion deductions in a manner consistent with the Commissioner's action for prior years. For 1928 he recommended an additional tax of $4,951.11, of which $4,523.33 was due to the disallowance of the depletion deduction for that year, and for 1929 he recommended an additional tax of $1,994.36, all of which was due to the disallowance of the depletion deduction for that year. June 26, 1930, during the progress of the revenue agent's examination, plaintiff executed two checks payable to the

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order of the collector of internal revenue at Phoenix, Arizona, and delivered them to the revenue agent. At the time of delivery one check for $5,220.13 had the following notation typed on the back thereof:

Payment of income tax of year 1928 as follows:

Assessment	$4, 951. 11
Interest	269. 02
Total	$5, 220. 13

This check is accepted as paid under protest pending final decision of the higher courts.

At the time of delivery the other check for $2,027.93 had the following notation typed on the back thereof:

Payment of income tax year 1929 as follows:

Assessment	$1, 994. 36
Interest	33. 57
Total	$2, 027. 93

This check is accepted as paid under protest pending final decision of the higher courts.

6. The checks referred to in finding 5 were endorsed by the collector and cashed July 15, 1930. In due time they were paid by plaintiff's bank and charged to plaintiff's account. The amount of the checks was credited to plaintiff in the collector's 9–D Suspense Account in accordance with the general practice of the Internal Revenue Bureau.

7. On his November 1930 Assessment List for the District of Arizona the Commissioner assessed additional taxes and interest against plaintiff as recommended by the revenue agent for 1928 and 1929 as follows:

Year	Tax	Interest	Total
1928	$4, 951. 11	$380. 28	$5, 331. 39
1929	1, 994. 36	33. 57	2, 027. 93
Total			7, 359. 32

Thereafter the collector transferred from his Suspense Account $7,248.06, the amount of the two checks which he had cashed July 15, 1930, and applied it against the foregoing assessments. December 5, 1930, the collector mailed a notice

and demand to plaintiff for $111.26 (the difference between the amount of the two checks, $7,248.06, and the amount of the two assessments, $7,359.32) designated as the "Balance Interest Due" on the assessment for 1928. This additional interest of $111.26 was paid by plaintiff December 18, 1930, but it was refunded to plaintiff in 1934 as shown in finding 10.

8. October 31, 1932, plaintiff filed with the collector for the District of Arizona refund claims for 1928 and 1929 demanding refund of $5,220.13 and $2,027.93, respectively, with interest thereon. The basis of the claims was set out in a letter attached thereto which read as follows:

> On demand for refund of overpayment of income tax for the year's 1928 and 1929, as enclosed herewith, is a part of an overpayment made by us to the Treasury Department for the years 1923 to 1929, inclusive. The overpayment was the result of a dispute with the Commissioner of Internal Revenue over a 3¢ per lb. of copper rate taken by this company as a charge against its earnings for those years.
>
> The case was referred to the Board of Tax Appeals for settlement and the case came up under Docket #34087, 45273, and 46248. Included in the suit for refund was [were] the years 1923 to 1927, inclusive, and did not include the years 1928 and 1929, for the reason that these two years were not made up or checked by the auditor at that time. The case was decided in favor of the Commissioner and an appeal taken to the U. S. Court of Appeals, District of Columbia, for review. The case came up under Docket #5348 and resulted in reversing the opinion of the body on March 14th, 1932.
>
> Before trying the case before the Board of Tax Appeals, the collector of internal revenue demanded payment of this tax and at the same time assessed an interest charge of 12% against any unpaid part so that we were compelled to make overpayment under protest to avoid the high rate of interest. The collector of internal revenue accepted the payment as paid under protest and to be governed by the result of the suit.
>
> We made payment for the years 1923 to 1926, inclusive, on March 31st, 1930, and for the years 1927 to 1929 on June 26th, 1930, all paid under the same conditional agreement with the one and only purpose of having all of our tax problems settled at one time.

Opinion of the Court

It is our opinion that since the overpayment was made in good faith and paid under a conditional agreement, that its acceptance should be governed by the decision of the courts and that we would have no trouble in getting a refund after the courts had made their decision and we felt that the overpayment would be safe until such time when a fair and just settlement could be made.

The opinion of the U. S. Court of Appeals declares the demand for payment of income tax for the years 1923 to 1927 was in error and the collection so made was illegal.

Through lack of knowledge of the income tax laws and the ever changing time limits on refunds, our demands for the refund for the years 1928 and 1929 was [were] overlooked until after the law of limitation had expired; in fact, the time had expired before we had definite word from the Commissioner what settlement would be made in our case.

Now, it seems to us that a tax paid under protest with a conditional agreement that the payment is to be governed by a certain decision of the court is really a demand for its return after a certain decision is made and accepted and we feel that the refund for those two years should be made.

9. January 17, 1933, the Commissioner notified plaintiff that the aforementioned refund claims for 1928 and 1929 would be rejected and they were rejected February 15, 1933.

10. After further negotiations in connection with the claims for 1928 and 1929 the Commissioner on July 16, 1934, notified plaintiff that its refund claim for 1928 would be allowed to the extent of $111.26, the payment made by plaintiff December 18, 1930, and that amount was subsequently refunded to plaintiff. Except for the payment of $111.26, no refund has been made to plaintiff of the taxes and interest paid by it for 1928 and 1929.

The court decided that plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The only question in this case is whether the formal refund claim for 1928 and 1929 filed by plaintiff October 31, 1932, can be held to have been a perfection of informal

claims filed by plaintiff with the collector shortly after June 26, 1930. The informal claims were written on the backs of the two checks executed on that date, payable to and delivered to the Collector of Internal Revenue, as follows: "This check is accepted as paid under protest pending final decision of the higher courts."

We are of opinion that when these informal claims are considered in the light of the facts and the circumstances existing at the time, the formal refund claim filed October 31, 1932, was but a perfection of the informal claims written by plaintiff on the backs of the checks delivered to the collector in June 1930. The collector accepted these checks on the conditions specified and endorsed his name immediately under the written claim of plaintiff that the tax therein specified was being accepted pending final decision of the higher courts. Refund claims, whether formal or informal, are not required to be filed with the Commissioner. A claim that would be good if filed with and accepted by the Commissioner is good if filed with and accepted by the collector. The fact that the collector may have been negligent in preserving the same in his records, or forwarding the same to the Commissioner or advising the Commissioner of the contents thereof, does not render the claim void or ineffectual. A written document constituting a demand for the return on a proper ground of the money paid, when accepted as such by the collector, is sufficient to constitute an informal claim for refund subject to completion and perfection at a later date if not previously acted upon by the Commissioner. The fact that the Commissioner did not receive from the collector the taxpayer's demand for the return of the amount paid upon the condition specified and accepted by the collector should not prejudice the taxpayer's right later to perfect such demand by formal claim. The collector knew when he received and accepted the checks and cashed them that the taxpayer was thereby filing claims for refund of such tax based upon its claim then pending in the court that the taxes for 1928 and 1929 were not due. Prior to the payment of the additional tax here involved for 1928 and 1929 the Commissioner had de-

termined deficiencies for the years 1923 to 1927, inclusive, by the denial of deductions which gave rise to the additional taxes paid for 1928 and 1929 and had notified the taxpayer thereof by letter. In reply thereto the plaintiff advised the Commissioner that it was taking the questions before the United States Board of Tax Appeals and called his attention to the fact that the same dispute was involved in the tax liability for 1928 and 1929.

Prior to the time the taxes of 1928 and 1929 were paid, on condition that they were accepted pending final decision of the Court of Appeals of the District of Columbia, to which the case for other years was then being taken, plaintiff had advised the Commissioner that it had ceased operations and that its cash funds were being held in the bank pending final settlement of its income-tax problems for the years 1923 to 1929, inclusive, before closing out its accounts with the stockholders.

On March 13, 1930, the Board of Tax Appeals decided against the plaintiff, 19 B. T. A. 258, with respect to its tax liability for the years 1923 to 1927, inclusive, which years involved the same questions upon which the informal demands for the return of the tax paid for 1928 and 1929 were based. Immediately thereafter plaintiff took an appeal from the decision of the Board to the Court of Appeals of the District of Columbia and that court, in March 1932, reversed the decision of the Board and held that plaintiff was entitled to the deductions claimed. That decision became final and on October 19, 1932, the Commissioner mailed plaintiff refund checks for the overpayments for 1923 to 1927, inclusive. Thereupon, plaintiff called the Commissioner's attention to a formal claim for refund for 1928 and 1929 perfecting its timely informal claims made to the collector shortly after June 26, 1930. The Commissioner refused to refund the overpayments for 1928 and 1929 and rejected plaintiff's claim.

We are of opinion, under the facts and circumstances of this case, that the claims filed were sufficient for allowance of the refunds of the overpayments for 1928 and 1929 and, having been rejected by the Commissioner, that plaintiff is entitled in this proceeding to recover the overpay-

Syllabus

ments with interest. Judgment will be entered in favor of plaintiff for $6,787.66 with interest as provided by law. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

DOROTHY SEPTIMA BENCE v. THE UNITED STATES

[No. 42911. Decided April 5, 1937]

On the Proofs

Income tax; to whom distributable and nondistributable income of trust taxable.—The revenue acts provide that taxes upon trust income not distributable or distributed to the beneficiary of the trust shall be paid by the trust; but that in the case of a distributable trust, the taxes shall be paid by the beneficiary on the amounts distributed or distributable.

Same.—Where a trust receives nondistributable income from sources within the United States, the identity of such income, as being from the sources from which received ceases upon its being returned and taxed to the trustee; while in the case of a distributable trust, the trust is a mere conduit through which the income passes to the beneficiary, who is made taxable thereon, the amounts received by the beneficiary retaining their identity as income from sources within the United States until their receipt by the beneficiary, who under the statutes is taxable thereon. In other words, receipt by the trust of money distributable to a beneficiary is, for the purpose of taxation, receipt by the beneficiary.

Distributable alien income to non-resident alien.—Distributable income from sources within the United States to a nonresident alien through, and as a beneficiary of, an alien trust was taxable to such beneficiary under the Revenue Act of 1926.

Sufficiency of claims for refund.—Where a nonresident alien filed claims for refund of income taxes on the ground that the income taxed was not received from sources within the United States, and during conferences with the office of the Commissioner of Internal Revenue her right to deductions for income taxes paid the Government of Great Britain was discussed and conceded and additional time granted her to show the amount of such British taxes, and she later filed receipts therefor as a part of her refund claims, and the Commis-

sioner allowed the deductions in the computation of her tax liability but refused to refund the resulting overpayments, the claims as amended by the filing of such receipts were sufficient claims for refund of such overpayments.

The Reporter's statement of the case:

Mr. Newell W. Ellison for the plaintiff. *Mr. Wm. Merrick Parker* and *Covington, Burling, Rublee, Acheson & Shorb* were on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Robert H. Jackson*, for the defendant.

Plaintiff sues to recover alleged overpayments of income taxes, with interest, in the amounts of $205.24 for 1927, $3,220.62 for 1928, $175.35 for 1929, and $575.19 for 1930.

Plaintiff, a nonresident alien, is, and was during the taxable years involved, the sole beneficiary of a foreign testamentary trust administered by a foreign trustee. The income of the trust was distributable to plaintiff and was actually so distributed to her during the taxable years; it consisted of dividends on the stock of a domestic corporation, which dividends were paid to the trustee and distributed to plaintiff as such sole beneficiary.

The question presented is whether the dividends so received by plaintiff were taxable to her as income from sources within the United States.

Plaintiff contends that the amounts received by her, consisting of dividends as above mentioned distributed to her by the trustee, were not income from sources within the United States. If it be held that such income was from sources within the United States and, therefore, taxable to plaintiff, there is a further question as to whether plaintiff is entitled to recover a portion of the taxes paid by reason of her failure to receive a deduction for income taxes paid to Great Britain.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is, and was at all times herein mentioned, a citizen and subject of Great Britain, residing in London,

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England. She paid income taxes to the United States in the amounts of $205.24 for 1927, $3,220.62 for 1928, $175.35 for 1929, and $575.19 for 1930. Her former husband, Percy Russell Grace, a citizen and subject of Great Britain, resided in the County of Kent, England, and died there testate February 27, 1922. In his will, which was duly admitted to probate and recorded in the principal probate registry of His Majesty's High Court of Justice, the testator devised and bequeathed the residue of his real and personal estate to the public trustee upon trust to pay the income of the testamentary trust thus created to plaintiff during her life, and, at her death, to hold the said residue and the income therefrom in trust for others. Included in the testamentary trust were shares of stock in W. R. Grace & Company, a corporation, with principal offices in New York City. A true copy of the will of Percy Russell Grace, with codicil attached, is Exhibit A to the petition herein and is made a part hereof by reference.

2. During each of the years 1927, 1928, 1929, and 1930 the public trustee paid to the plaintiff the income of said testamentary trust. Of the income received during those years by the testamentary trust, the following amounts consisted of dividends on stock of W. R. Grace & Company held by it:

1927	$23, 508. 00
1928	55, 020. 00
1929	20, 276. 00
1930	30, 780. 00

3. For each of the years 1927, 1928, 1929, and 1930 the plaintiff filed an income-tax return with the Collector of Internal Revenue for the Second District of New York and reported therein as her income the dividends above set forth which were received by the testamentary trust for such year on stock of W. R. Grace & Company, and the taxes shown on the returns to be due were assessed against and paid by the plaintiff, with the exception that a part of the tax shown to be due for 1930 was not paid as hereinafter explained. The dates the returns were filed, the amounts of

Reporter's Statement of the Case

taxes shown to be due, and the dates the taxes were paid were as follows:

Year	Return filed	Tax shown due	Dates of payment	
1927	June 13, 1928	$410.48	June 13, 1928 Sept. 14, 1928 Dec. 13, 1928	$102.62 102.62 205.24
			Total payments for 1927	410.48
1928	June 14, 1929 June 20, 1930 (amended return)	881.60 3,662.80	June 14, 1929 Sept. 14, 1929 Dec. 14, 1929 June 20, 1930 Aug. 25, 1930 (Interest)	440.80 220.40 220.40 2,781.20 219.02
			Total payments for 1928	3,881.82
1929	June 14, 1930	233.80	June 14, 1930 Sept. 15, 1930 Dec. 15, 1930	116.90 58.45 58.45
			Total payments for 1929	233.80
1930	June 15, 1931	942.40	June 15, 1931 Sept. 15, 1931	471.20 235.60
			Total payments for 1930	706.80

The balance of the assessment for 1930 ($235.60) was not paid and was later abated.

4. No part of the taxes paid for 1927 and 1928 has been refunded. On August 10, 1933, $58.45 of the taxes paid for 1929 was refunded, resulting from the allowance as a deduction for the taxes paid Great Britain, leaving a net tax paid for 1929 of $175.35. On the same date, $141.61 of the taxes paid for 1930 was refunded and $235.60 of the total assessment of $942.40 for 1930 was abated, resulting from the allowance as a deduction for the taxes paid Great Britain, leaving a net tax paid for 1930 of $575.19.

5. The plaintiff filed claims for refund which were disallowed as follows:

Year	Date filed	Amount	Date disallowed
1927	Dec. 15, 1931	$205.24	Feb. 4, 1933
1928	Dec. 15, 1931	$3,220.62	Feb. 4, 1933
1929	Feb. 5, 1932	$233.80	Feb. 4, 1933
1930	Feb. 5, 1932	$706.80	April 11, 1933

The foregoing claims for refund were based upon the ground that plaintiff was a nonresident alien and during the years 1927, 1928, 1929, and 1930 she received no income from

sources within the United States and that the income reported in her returns for those years, upon which the taxes were assessed and paid, consisted solely of income received by her as a beneficiary of a foreign testamentary trust created by the will of Percy Russell Grace, deceased, and administered during those years by a nonresident alien trustee.

6. During consideration of these claims by the Commissioner of Internal Revenue, before any action had been taken thereon, and at a conference in the Commissioner's office between the Commissioner's authorized representative and plaintiff's duly authorized representative on July 18, 1932, the above-mentioned claims for refund for 1927 to 1930, inclusive, and the matter of the tax liability of plaintiff for those years were discussed. At that time the Commissioner was advised by plaintiff that for each of the years she had paid income taxes on the income in question to the Government of Great Britain, and she then contended that in determining her correct tax liability for the years 1927 to 1930, inclusive, there should at least be deducted from her income the amount of income taxes thus paid to Great Britain for each of the years in question. Her right to such deductions, in accordance with the applicable revenue acts, was conceded and plaintiff's authorized representative was given additional timé within which to ascertain and furnish the Commissioner with information as to the exact amount of income taxes paid to Great Britain on said income in each of the years involved. On December 14, 1932, plaintiff ascertained the exact amounts and forwarded to the Commissioner, in connection with and as a part of her refund claims, written receipts issued by the National Provincial Bank, Ltd., showing the income taxes thus paid to Great Britain on the income in question for each of the years 1927, 1928, and 1929. As shown by the receipts forwarded to and filed with the Commissioner, as above mentioned, plaintiff paid income taxes to Great Britain in the amounts of $3,398.99 for 1927, $12,264.60 for 1928, and $4,039.48 for 1929. For 1930 plaintiff paid $4,848.67 to Great Britain which the Commissioner allowed as a deduction for that year and deducted it from her income in arriving at the net tax of $575.19. For 1929 the Commis-

sioner allowed a deduction from income of taxes paid to Great Britain and determined an overassessment for that year of $146.70 resulting from the allowance, as a deduction, of the amount of such income taxes paid to Great Britain on the income here in question, which overassessment of $146.70 was shown in a certificate of overassessment mailed to the taxpayer, but the Commissioner refunded only $58.45 thereof and refused to refund the balance of $88.25 on the ground that it was barred by the statute of limitation for the reason that the original claim filed was not sufficient to authorize a refund by reason of the allowance of a deduction for taxes paid to Great Britain.

The Commissioner also refused to refund any portion of the tax of $205.24 and $3,220.62 paid for the years 1927 and 1928, respectively, overpaid by reason of the allowable deductions for income taxes paid to Great Britain in the amounts above mentioned, on the ground that the original claims for refund filed did not state these deductions as a ground thereof, and that such claims could not be amended.

The court decided that plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The question presented in this case is whether the amounts received by plaintiff during the taxable years 1927 to 1930, inclusive, as the sole beneficiary of a distributable trust created by the will of her husband, Percy Russell Grace, were taxable to her as income from sources within the United States in accordance with sections 213 (c) and 217 of the Revenue Act of 1926.

The amounts received by plaintiff upon which she was held taxable consisted of dividends of a domestic corporation received by her during the taxable years from the trustee of a distributable testamentary trust created by her former husband.

Plaintiff contends that under the applicable revenue acts she is subject to income tax only on income from sources within the United States; that the amounts received by her were income from a foreign testamentary trust and not income to her from sources within the United States; that

the trust was a separate entity and that the revenue acts do not provide that income received by a nonresident alien from a foreign testamentary trust shall be treated as income from sources within the United States, nor is any such provision made in any rules or regulations prescribed by the Commissioner of Internal Revenue. Stated another way, plaintiff contends that what she received was trust income rather than dividends, and that, since the stock of the domestic corporation upon which such dividends were paid was held by the trustee and the dividends upon such stock were paid to the trustee, such dividends, if taxable at all, were taxable only to the trust and that the character of such dividends as being income from sources within the United States ceased upon their receipt by the trust.

The power of Congress to tax the income in question is conceded, but it is contended that Congress did not intend to tax it in circumstances here present and that the language of the pertinent sections of the revenue acts does not reach it. We are of opinion that the income in question was taxable to plaintiff as dividends from a domestic corporation and that the Commissioner correctly denied her claims for refund on this ground. It is generally true that a trustee is not the agent of a beneficiary and that the receipt by a trustee does not amount to a receipt by the beneficiary, but this rule is subject to important exceptions, particularly with respect to federal taxation. The argument that a trustee is not an agent for a beneficiary and that the language of the revenue acts does not, in the circumstances, reach this income fails to take proper account of the structure and the underlying purpose of the revenue acts providing for the taxation of the income of the trust and also of the fact that a beneficiary of a distributable trust has an equitable, if not a legal, interest in the trust property. See *Edward T. Blair* v. *Commissioner of Internal Revenue*, 300 U. S. 5, decided February 1, 1937. The purpose to exact a tax upon all incomes of nonresident aliens from sources within the United States is clear. And it was the obvious purpose of Congress to impose such tax upon the person required by the statute to report such income and pay the tax thereon. The revenue acts provide

Opinion of the Court

that a trust shall pay the tax upon income which is not distributable, or distributed, to the beneficiary and that the trustee shall make a return and pay the taxes. In the case of receipt by a trust of nondistributable income from sources within the United States, the identity of such income as being from such source ceases upon its being returned and taxed to the trustee and it is not subsequently taxable to the beneficiary if and when it is distributed. In the case of a distributable trust, the statutes provide that the trustee shall deduct amounts taxable to the beneficiary and that the beneficiary shall report and pay the tax on the amounts distributed or distributable. Thus the intent to tax the entire income of the trust, either to the trustee or to the beneficiary, is clear. A distributable trust is treated by the statute as a mere conduit through which the income passes to the beneficiary who is made taxable thereon and, in instances of the character with which we are here concerned, the amounts received by the beneficiary retain their identity as dividends and as income from sources within the United States until their receipt by the beneficiary who, under the statute, is made taxable thereon. In other words, the receipt by the trust of money distributable to a beneficiary is for the purpose of taxation receipt by the beneficiary. In *Freuler*, *Administrator*, v. *Helvering*, 291 U. S. 35, the court, in construing section 219 of the Revenue Act of 1921 and similar provisions of the Revenue Act of 1926, said:

> Plainly the section contemplates the taxation of the entire net income of the trust. Plainly, also, the fiduciary, in computing net income, is authorized to make whatever appropriate deductions other taxpayers are allowed by law. The net income ascertained by this operation, and that only, is the taxable income. This the fiduciary may be required to accumulate; or, on the other hand, he may be under a duty currently to distribute it. If the latter, then the scheme of the act is to treat the amount so distributable, not as the trust's income, but as the beneficiary's. But as the tax on the entire net income of the trust is to be paid by the fiduciary, or the beneficiaries, or partly by each, the beneficiary's share of the income is considered his property

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> from the moment of its receipt by the estate. This treatment of the beneficiary's income is necessary to prevent the possibility of postponement of the tax to a year subsequent to that in which the income was received by the trustee. If it were not for this provision the trustee might pay on part of the income in one year and the beneficiary on the remainder in a later year. For the purpose of imposing the tax, the act regards ownership, the right of property in the beneficiary, as equivalent to physical possession. The test of taxability to the beneficiary is not receipt of income, but the present right to receive it.

See, also, *Helvering* v. *Butterworth et al., Trustees*, 290 U. S. 365.

If it be assumed that the amounts received by plaintiff during the years in question were not dividends within the meaning of section 217 (a) (2) of the Revenue Act of 1926 when received by plaintiff, they were, nevertheless, taxable to her as income from sources within the United States since such amounts were paid on stock of a corporation doing business in the United States and were, therefore, derived from sources within the United States. In *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, the court said:

> The general object of this act is to put money into the federal treasury; and there is manifest in the reach of its many provisions an intention on the part of Congress to bring about a generous attainment of that object by imposing a tax upon pretty much every sort of income subject to the federal power. Plainly, the payment in question constitutes income derived from a source within the United States; and the natural aim of Congress would be to reach it.

The case of *Vondermuhll* v. *Helvering*, 75 Fed. (2d) 656, relied upon by the plaintiff, is distinguishable on the facts.

Our conclusion that plaintiff was properly taxed upon the amounts received by her in the years involved presents the further question whether she may recover any portion of the net tax determined by the Commissioner for the years 1927, 1928, and 1929 on account of her failure to

receive at the hands of the Commissioner the full benefit of the authorized deductions for income taxes paid to Great Britain. Neither the amount of taxes so paid to Great Britain in each of the years 1927 to 1929, inclusive, nor the legality of the deduction thereof is in controversy. The only question is whether the claims for refund for these years, when acted upon by the Commissioner, were sufficient as originally made and as amended by the filing of written receipts for the taxes paid after and pursuant to a conference with the Commisisoner on July 18, 1932, as disclosed in finding 6. In the circumstances of this case we think the claims were made sufficient for the purpose of the allowance and suit as a result of the consideration and discussion of the claims between the Commissioner and the plaintiff on July 18, 1932, with specific reference to the allowable deductions for income taxes paid to Great Britain and the filing by plaintiff with the Commissioner, as a part of its claims, of the written receipts for the taxes paid to Great Britain in each of the years 1927 to 1930, inclusive. The Commissioner was not misled. He had all the information that he desired and all that plaintiff could furnish and the demand of plaintiff for the refund of such amounts as might result from these conceded deductions was evidenced in written form before the Commissioner acted upon the claims. In addition, plaintiff and the Commissioner, during consideration of the claims when this question was raised and discussed, considered and treated the filing of the written receipts by plaintiff as being sufficient to bring these items into her claims then under consideration as a ground for refund in the years involved. The Commissioner allowed the deductions in his computations of the tax liability but refused to refund the overpayments resulting from such deductions for 1927, 1928, and 1929. For 1930 the Commissioner allowed the entire deduction claimed of $4,848.67 in determining the net tax of $575.19 paid for that year. There has, therefore, been no overpayment for that year.

Entry of judgment for the years 1927, 1928, and 1929 will be withheld pending the filing by the parties of a

computation showing the amounts of the overpayments for those years resulting from the deductions of taxes paid to Great Britain. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

THOMAS C. EDWARDS v. THE UNITED STATES

[No. 43157. Decided April 5, 1937]

On the Proofs

Interest on allowed claim erroneously witheld from payment by Comptroller General, under Act of March 3, 1875.—Where the Comptroller General under the act of March 3, 1875, as amended, withheld payment of money due a contractor under certain contracts with the Government to satisfy an erroneous claim against the contractor under another contract with the Government, the contractor is entitled to interest on the money so withheld from him.

The Reporter's statement of the case:

Mr. M. Walton Hendry for the plaintiff.

Mr. Herbert A. Bergson, with whom was *Mr. Assistant Attorney General James W. Morris*, for the defendant.

Plaintiff brings this suit to recover $371.94 under the Act of March 3, 1875, being interest at 6% per annum on $4,045.43 duly allowed by legal authority and withheld from August 21, 1931, on the ground that plaintiff was otherwise indebted to the United States. The amount so withheld was offset over plaintiff's objection against other moneys due him. The amount sought to be recovered represents interest from the date of withholding on August 21, 1931, to March 3, 1933, the date on which the Act of March 3, 1875, was amended by the Act of March 3, 1933, 47 Stat. 1489.

Reporter's Statement of the Case

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff is a citizen of Alvin, Texas, where he is engaged as a dealer in hay and grain.

2. July 18, 1930, the Chief of Finance of the United States Army reported to the General Accounting Office that he had determined plaintiff to be indebted to the United States in the amount of $4,003.89, alleged excess cost to the Government of hay purchased in the open market by the War Department by reason of the alleged default by plaintiff under Contract No. W-503-QM-6223, for furnishing a quantity of hay and straw to the United States. At that time plaintiff had other contracts with the United States which he had fully performed and completed, and for which he had not been fully paid.

By settlement on August 21, 1931, the Comptroller General approved claims of the plaintiff under other contracts, which claims had been duly allowed by legal authority, aggregating $4,091.08. The amount of $2,954.90 was found to be due plaintiff under his Contract W-503-QM-7549 dated July 3, 1930, and the amount of $1,136.18 to be due under his Contract W-503-QM-7499, dated July 1, 1930. Inasmuch as the amount of $4,091.08 due plaintiff and duly allowed by legal authority was in excess of the alleged indebtedness of plaintiff to the United States, the Comptroller General on August 21, 1931, authorized payment to plaintiff of the excess of $45.65 and, over plaintiff's protest and objection, withheld $4,045.43 and paid the same to the Treasurer of the United States in reimbursement of the alleged indebtedness of plaintiff to the United States for excess costs resulting from purchase in the open market of hay on account of the alleged failure of plaintiff to furnish hay to meet the requirements of Contract No. W-503-QM-6223 dated September 18, 1929.

Thereupon plaintiff brought suit in this court (*Edwards v. United States*, 80 C. Cls. 118) seeking to recover $9,578.08 as loss and damages alleged to have been sustained by him by reason of the alleged breach by the United States of Contract W-503-QM-6223, mentioned above, under which the claimed indebtedness of plaintiff to the United States

arose. This court made findings of fact and rendered an opinion November 5, 1934, pursuant to which judgment of the court was entered in favor of plaintiff for $4,045.43 representing the excess cost charged against plaintiff and satisfied by withholding that amount of money due plaintiff under other contracts which was applied by the defendant against the alleged indebtedness under Contract No. 6223 upon which that suit was based. That judgment was paid.

3. Plaintiff claimed interest under the Act of March 3, 1875, in the suit on Contract No. 6223 but such claim was denied by the court on the ground that the suit was one for damages for a breach of Contract 6223 under which no amount had been allowed and withheld under the Act of 1875. After entry of judgment of the court plaintiff duly presented the judgment for payment and the same was paid on or about April 27, 1935. Thereafter plaintiff duly presented a claim for allowance and payment of interest at 6% per annum on $4,045.43 theretofore duly allowed by legal authority under Contracts 7549 and 7499 and erroneously withheld from August 21, 1931. This claim was denied, and payment of any interest on the amount duly allowed by legal authority and withheld was refused.

The court decided that plaintiff was entitled to recover $371.94.

LITTLETON, *Judge*, delivered the opinion of the court:

In the case of *Edwards* v. *United States*, M–396, 80 C. Cls. 118, this court on February 4, 1935, upon plaintiff's motion that interest under the Act of 1875 be allowed in the judgment in that case, said:

> These motions must be denied for the reason that this suit was brought for a breach of contract No. W–503 QM 6223 in charging plaintiff with the excess cost of $4,045.43, above mentioned, and not for the recovery of the amount of $4,045.43, with interest, duly allowed and withheld under contract W–503 QM 7549. No interest is allowable by the court in its judgment rendered under contract W–503 QM 6223, since that contract did not provide for interest, and no amount due thereunder was allowed by legal authority and

Syllabus

withheld. If the defendant should refuse to pay interest under the Act of March 3, 1875, on the amount duly allowed and withheld under contract W–503 QM 7549, plaintiff may have a cause of action therefor, but such claim for interest cannot be raised and made, at this time, under suit upon contract W–503 QM 6223.

When the judgment of the court in the case of this plaintiff, M–396, was paid, plaintiff's claim for interest on the total amount due him under other contracts which had been duly allowed by legal authority and withheld was denied, and this suit to recover such interest was thereupon instituted. The interest claimed should have been allowed, and judgment therefor in favor of plaintiff will be entered. *Detroit, Toledo, and Ironton Railroad Co.* v. *United States*, 77 C. Cls. 227; *Whitbeck* v. *United States*, 77 C. Cls. 309, 342, 343; *Highland Milk Condensing Co.* v. *United States*, 77 C. Cls. 645; *Chicago, Indianapolis, and Louisville Railway Co.* v. *United States*, 78 C. Cls. 96; *Allis-Chalmers Manufacturing Co.* v. *United States*, 79 C. Cls. 453, 464. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* GREEN, *Judge;* and BOOTH, *Chief Justice*, concur.

M–266—E. D. KALBFLEISH v. THE UNITED STATES

M–246—MORTIMER S. CRAWFORD v. THE UNITED STATES

M–284—EARL W. CRIGER v. THE UNITED STATES

M–241—BAYARD L. BELL v. THE UNITED STATES

M–271—ROBERT J. MUNFORD v. THE UNITED STATES

M–299—H. V. SHURTLEFF v. THE UNITED STATES

M–307—LUCIAN C. WHITAKER v. THE UNITED STATES

M–304—LEE N. UTZ v. THE UNITED STATES

M–248—ALBERT L. GARDNER v. THE UNITED STATES

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M-288—WILLIAM G. MANLEY v. THE UNITED STATES

M-297—JACOB ROELLER v. THE UNITED STATES

M-292—JAMES T. MOORE v. THE UNITED STATES

M-293—JOHN D. MUNCIE v. THE UNITED STATES

M-306—J. C. WEMPLE v. THE UNITED STATES

M-287—W. B. JAMES v. THE UNITED STATES

M-268—E. G. KIRKPATRICK v. THE UNITED STATES

M-262—LOFTON C. HENDERSON v. THE UNITED STATES

41871—EDMUND M. McCALLAWAY v. THE UNITED STATES

M-245—JOHN H. COFFMAN v. THE UNITED STATES

M-308—F. M. WULBERN v. THE UNITED STATES

M-296—FRANK P. PYZICK v. THE UNITED STATES

42789—GREGON A. WILLIAMS v. THE UNITED STATES

M-260—GORDON HALL v. THE UNITED STATES

M-263—RICHARD N. JOHNSON v. THE UNITED STATES

41869—CLAYTON C. JEROME v. THE UNITED STATES

M-291—LYMAN G. MILLER v. THE UNITED STATES

41870—CLAUDE A. LARKIN v. THE UNITED STATES

M-303—MERRILL B. TWINING v. THE UNITED STATES

M-252—W. G. GRIFFITH, ADMR. v. THE UNITED STATES

M-270—W. E. McCAUGHTRY v. THE UNITED STATES

M-250—C. B. GRAHAM v. THE UNITED STATES

M-301—JOHN H. STILLMAN v. THE UNITED STATES

M-247—J. H. FITZGERALD v. THE UNITED STATES

M-267—FRANCIS J. KELLY, JR., v. THE UNITED STATES

M-285—PRENTICE S. GEER v. THE UNITED STATES

M-305—WILLIAM J. WALLACE v. THE UNITED STATES

M-295—E. T. PETERS v. THE UNITED STATES

42804—J. N. SMITH v. THE UNITED STATES

M-253—THEODORE A. HOLDAHL v. THE UNITED STATES

M-261—DONALD M. HAMILTON v. THE UNITED STATES

[Decided April 5, 1937]

On the Proofs

Rental allowances, commutation of quarters; officers in Marine Corps, without dependents; service with troops in China; field duty.—An officer of the United States Marine Corps, without dependents, on duty with United States troops in China in 1927–1928 protecting American lives and property during a period of disorder there, with friendly relations existing between such troops and the Chinese authorities and Government, was not on "field duty" within the meaning of the act of June 10, 1922, as amended, and the executive order of the President pursuant thereto, and was therefore entitled to rental allowances under said act.

The Reporter's statement of the case:

Mr. Rees B. Gillespie for the plaintiffs. *Mr. John W. Price* was on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Acting Assistant Attorney General William W. Scott*, for the defendant.

The court made special findings of fact and conclusion of law as follows:

1. The plantiffs herein are commissioned officers in the United States Marine Corps, and, during the periods set out in their respective petitions, were on active duty, without dependents, in the Republic of China. Adequate public

quarters were not available to any of them at any time during the period of their detail in China, and none of them at any time during their service in China were furnished adequate quarters at government expense.

2. Following the Boxer uprising in 1901, China and certain nations, including the United States, entered into the so-called "Boxer Treaty", by the terms of which the signatory powers were given the right to maintain, train, and maneuver such troops within certain prescribed neutral zones as might be deemed necessary to insure the neutrality of those zones and secure certain other guarantees set out in the treaty. For some years preceding the dispatch of the United States Marines to China, with which plaintiffs had service, a condition of civil war existed in many parts of that country. Contending Chinese factions were struggling for control of the government, and while those in authority on both sides were friendly with the Nationals of the United States and other countries living in China and sought to prevent trouble with them, roving bands of irresponsible Chinese outlaws and bandits went about the country seeking opportunities to loot and plunder. They committed depredations alike on the native population and on aliens. Because of these unsettled conditions and the widespread lawlessness prevailing, the United States authorities deemed it necessary for the proper and adequate protection of the lives and property of American citizens living in China to increase its armed forces in the neutral zones established by treaty, and a brigade of marines of approximately 4,400 officers and men was added to the forces theretofore on duty in China. The regiments to which plaintiffs were attached formed a part of this, the Third Brigade.

During the period involved Great Britain, France, Italy, Japan, Portugal, Spain, and Holland, as well as the United States, had a quota of troops stationed in the concession and neutral zones of China as defined in the treaty.

3. During the year 1928 the Chinese national forces advanced upon and occupied Peking and Tientsin, but, due to the absence of heavy fighting by the Chinese forces nominally in opposition, there was no serious disorder. American nationals in those cities, although apprehensive for a time as to

their safety, were not molested. The occupation of these cities by the Chinese national forces is the only military operation of any kind shown to have occurred in China during the period of plaintiffs' detail there.

Thereafter conditions in China were much improved and a number of business men and missionaries returned to their homes and stations in the interior from which they had been previously evacuated, and an intermittent traffic by American merchant vessels was begun up the Yangtze River.

4. During the plaintiffs' entire detail in China they engaged in no combat with Chinese troops, nor with Chinese bandits or outlaws. From the time of their arrival in China until their departure for the United States no single shot was fired by the marine forces with which they served. The leaders of the contending factions, as well as the Chinese people as a whole, including the irresponsible roving and predatory bands, were distinctly friendly to American citizens within their territory. Brigadier General Smedley D. Butler was the recipient of two "ceremonial umbrellas", tokens of regard from the people of Tientsin and an adjacent village. He was also presented with a silver shield by the Nationalist Army, inscribed to show it was presented as an evidence of the high esteem in which the brigade was held by them. The troops of the Third Brigade joined in with the Chinese army and assisted them in the construction of twenty-five miles of road, which was marked by them and called the Sino-American Highway. During the construction of this road the Chinese troops and the Marines lived in the same camps, and the American flag and the Chinese flag flew side by side.

5. Plaintiffs' service with troops during the period of their detail in China consisted of garrison and guard duties, occasional parades, practice on the rifle range, reviews, inspections, and two or three military reconnaissances. They participated with troops in no marches, occasional encampments, regular movements, desultory combats, or pitched battles.

6. The Navy Department has certified to the court the amount due the respective plaintiffs in these cases, in case it be held that they are entitled to recover for the commutation

of quarters. The report of the Navy Department certifying these amounts is hereby made a part of this finding by reference.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiffs in each of the cases herein are entitled to recover.

It is therefore adjudged and ordered that the respective plaintiffs recover of and from the United States the following sums: M-266, E. D. Kalbfleish, one thousand two hundred thirty six dollars ($1,236.00); M-246, Mortimer S. Crawford, forty four dollars ($44.00); M-284, Earl W. Criger, five hundred ninety four dollars ($594.00); M-241, Bayard L. Bell, four hundred twenty nine dollars and thirty three cents ($429.33); M-271, Robert J. Munford, seven hundred seventy dollars and sixty seven cents ($770.67); M-299, H. V. Shurtleff, one thousand two hundred dollars ($1,200.00); M-307, Lucian C. Whitaker, eight hundred seventy two dollars ($872.00); M-304, Lee N. Utz, three hundred forty dollars ($340.00); M-248, Albert L. Gardner, six hundred fifty three dollars and thirty three cents ($653.33); M-297, Jacob Roeller, five hundred eighteen dollars and sixty seven cents ($518.67); M-292, James T. Moore, eight hundred eighty four dollars ($884.00); M-293, John D. Muncie, seven hundred sixty nine dollars and thirty three cents ($769.33); M-306, J. C. Wemple, one thousand two hundred twelve dollars ($1,212.00); M-287, W. B. James, nine hundred ninety six dollars ($996.00); M-268, E. G. Kirkpatrick, nine hundred forty two dollars ($942.00); M-262, Lofton C. Henderson, two hundred seventy three dollars and thirty three cents ($273.33); 41871, Edmund M. McCallaway, seven hundred seventy one dollars and thirty three cents ($771.33); M-245, John H. Coffman, two hundred twenty dollars ($220.00); M-308, F. M. Wulbern, three hundred twenty four dollars ($324.00); M-296, Frank P. Pyzick, six hundred seventy six dollars ($676.00); 42789, Gregon A. Williams, seven hundred ninety three dollars and thirty three cents ($793.33); M-260, Gordon Hall, eight hun-

dred eighteen dollars and sixty seven cents ($818.67); M-263, Richard N. Johnson, one hundred seventy six dollars ($176.00); 41869, Clayton C. Jerome, five hundred eighty four dollars ($584.00); M-291, Lyman G. Miller, nine hundred dollars ($900.00); 41870, Claude A. Larkin, one thousand one hundred fifty four dollars ($1,154.00); M-303, Merrill B. Twining, five hundred seventeen dollars and thirty three cents ($517.33); M-252, W. G. Griffith, Admr., two hundred forty five dollars and thirty three cents ($245.33); M-270, W. E. McCaughtry, two hundred eighty six dollars ($286.00); M-250, C. B. Graham, five hundred sixteen dollars ($516.00); M-301, John H. Stillman, six hundred six dollars and sixty seven cents ($606.67); M-247, J. H. Fitzgerald, eight hundred and seventy-two dollars and sixty seven cents ($872.67); M-267, Francis J. Kelly, Jr., one thousand fifty dollars ($1,050.00); M-285, Prentice S. Geer, eight hundred eighty six dollars ($886.00); M-305, William J. Wallace, one thousand fifty nine dollars and thirty three cents ($1,059.33); M-295, E. T. Peters, four hundred twenty five dollars and thirty three cents ($425.33); 42804, J. N. Smith, five hundred fifty eight dollars and sixty seven cents ($558.67); M-253, Theodore A. Holdahl, four hundred eighty dollars ($480.00); M-261, Donald M. Hamilton, one hundred thirty eight dollars and sixty seven cents ($138.67); M-288, William G. Manley, three hundred seventeen dollars and thirty three cents ($317.33).

MEMORANDUM BY THE COURT

These several cases have been submitted to the court without oral argument with the understanding that they will follow and be controlled by the decision of the court in *R. J. Bartholomew* v. *United States*, No. M-239, which is this day announced, the facts in the *Bartholomew case* being identical with the facts in these cases. The decision in the *Bartholomew case* follows our decision in *R. L. Montague* v. *United States*, 79 C. Cls. 624, in which the legal question here involved is fully discussed. The defendant accepted the decision in the *Montague case* as a correct interpretation of the law and made no application to the Supreme Court for certiorari. The General Accounting Office, however, has

not seen fit to settle the claims here presented on the basis of the *Montague* decision. The respective plaintiffs in these suits have therefore been compelled to prosecute their claims to a final judgment in this court, although the law has long been settled that they are entitled to the allowances claimed.

ROBERT ESNAULT-PELTERIE v. THE UNITED STATES

[No. D-388. Decided April 5, 1937. Findings of fact amended April 20, 1937]

On Mandate of the Supreme Court

Infringement of patent on airplane controls; amendment of findings of fact.—Certain claims of the plaintiff's patent in suit held valid and infringed by the United States.

For original findings of fact, and opinion of the court, see 81 C. Cls. 785.

The Reporter's statement of the case:

This case was decided by the Court of Claims November 4, 1935, the patent in suit being held valid and to have been infringed by the Government, and the case was remanded for proof of the compensation plaintiff is entitled to recover.

The court's conclusions as to the validity and infringement of the patent appear from its conclusion of law and opinion in the case, but were not included in its special findings of fact; and on certiorari the Supreme Court held (299 U. S. 201) that findings on these questions should be included in the special findings of fact, and remanded the case to the Court of Claims for such findings.

Pursuant to the mandate of the Supreme Court, the Court of Claims entered an order, which, as amended April 20, 1937, is as follows:

ORDER

This case comes before the court on the mandate of the Supreme Court and on motions by the plaintiff and the defendant for additional findings of fact.

Order of the Court

It appears that on November 4, 1935, the Court of Claims filed special findings of fact with an opinion holding that the patent in suit is valid and has been infringed by the Government and that the plaintiff is entitled to recover. Thereafter, on January 24, 1936, the court filed an amended conclusion of law, holding that "plaintiff's patent is valid and has been infringed by the United States and that he is entitled to compensation therefor under the act of June 25, 1910, 36 Stat. 851, as amended by the act of July 1, 1918, 40 Stat. 705, and Section 155 of the Judicial Code."

On December 7, 1936, the Supreme Court of the United States filed its opinion in the case, the mandate of said court stating that the case was being remanded "for such proceedings in harmony with the opinion of this Court as the Court of Claims may determine, and with instructions that it specifically find whether plaintiff's patent in suit was valid, and, if found valid, whether it was infringed by the defendant."

Thereafter, on January 22, 1937, the plaintiff filed his motion for additional findings, and on March 2, 1937, the defendant filed its motion for additional findings. On consideration thereof:

IT IS ORDERED this 5th day of April 1937 that the plaintiff's said motion for additional findings be and the same is allowed in part and overruled in part, and that the defendant's said motion for additional findings be and the same is overruled.

IT IS FURTHER ORDERED that the special findings of fact filed in this case November 4, 1935, be and the same are this day amended by adding thereto findings XLVIII and XLIX, reading as follows:

XLVIII. Claims 2, 5, 6, 7, 8, and 9 of the Esnault-Pelterie patent in suit are valid.

XLIX. The three alleged infringing airplanes of the defendant all possess the single vertical lever movable in every direction for controlling the lateral or longitudinal equilibrium of the airplane, connected to equivalent controlling surfaces having the same functional effects as those disclosed in the patent.

Claims 2, 5, 6, 7, 8, and 9 of the Esnault-Pelterie patent in suit are infringed by defendant.

Order of the Court

The interlocutory judgment heretofore entered herein January 24, 1936, having been vacated by the Supreme Court December 7, 1936, the court now files a new interlocutory judgment reading as follows:

> Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff's patent is valid and has been infringed by the United States, and that he is entitled to compensation therefor under the act of June 25, 1910, 36 Stat. 851, as amended by the act of July 1, 1918, 40 Stat. 705, and Section 155 of the Judicial Code.

The former findings as herein amended together with the opinion of the court heretofore announced will stand.

BY THE COURT.

CASES DECIDED

IN

THE COURT OF CLAIMS

December 7, 1936 to April 25, 1937

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

CASES DECIDED NOVEMBER 9, 1936; MOTIONS FOR NEW TRIAL OVERRULED MARCH 1, 1937

No. 17643, Congressional. Emma W. Bay and Harry C. Holloway, trading as John W. Bay & Co.
No. 17658, Congressional. Jay F. Towner, trading as J. F. Towner & Sons.
No. 17665, Congressional. John Archer.
No. 17667, Congressional. Emma W. Bay.
No. 17691, Congressional. Harry C. Holloway.
No. 17715, Congressional. Laura Pancoast et al., Executrices of Laura T. Pancoast.

Damage resulting from establishment of Aberdeen Proving Ground. Findings of fact, with conclusions that the claims are neither legal nor equitable claims, and that payment rests in the discretion of Congress.

No. 42649. DECEMBER 7, 1936

John D. Foley.
Rental and subsistence allowances, Navy officer; dependent mother. Findings of fact, conclusion of law and judgment for $2,784.65.

No. J-657. DECEMBER 7, 1936

Con P. Curran Printing Co.
Refund of income and profits tax. Judgment for $4,553.09. Findings of fact and opinion, June 1, 1936, 83 C. Cls. 431.

No. 42946. JANUARY 11, 1937

Frederick S. Lee.

Rental allowances, officer in Army reserve, on duty in connection with Civilian Conservation Corps. Findings of fact, conclusion of law and judgment for $617.80, on authority of *O'Mohundro* v. *United States*, *ante*, p. 362.

No. K-58. JANUARY 11, 1937

Atlantic Mutual Insurance Co.

Claim for general average contribution in shipment on Government vessel. Opinion, 80 C. Cls. 11. Dismissed on mandate of the Supreme Court reversing the Court of Claims, 298 U. S. 483.

No. M-103. JANUARY 11, 1937

Joseph Huber.

Refund of income tax. Judgment for $6,035.08 for the year 1922; $4,898.05 for the year 1923 and $4,415.49 for the year 1924, a total of $15,348.62, with interest according to law. Findings of fact and opinion, November 9, 1936, 83 C. Cls. 643.

No. 42401. JANUARY 11, 1937

Osgood C. McIntyre.

Rental and subsistence allowances, Army officer; dependent mother. Judgment for $206.63, the balance due after deduction of defendant's counterclaim of $1,005.14. See 83 C. Cls. 701.

No. 43137. JANUARY 11, 1937

John O'Brien.

Retired pay of officer in Philippine Scouts. Judgment for $1,257.75. See 83 C. Cls. 703.

No. 42074. JANUARY 11, 1937

American Gas & Electric Co.

Refund of income tax. Judgment for $323,118.04 for the year 1926, with interest on $100,209.18 from August 20, 1931, and on $222,908.86 from March 21, 1932; and for $611,796.96 for the year 1927, with interest on $300,846.42 from August 20, 1931, and on $310,950.54 from March 21, 1932. Findings of fact and opinion, *ante*, p. 92.

No. 42836. FEBRUARY 8, 1937

William P. McGirr.

Rental and subsistence allowances, Navy officer; dependent mother. Findings of fact, conclusion of law, and judgment for $4,367.13.

No. 42932. FEBRUARY 8, 1937

Charles M. Heberton.

Rental and subsistence allowances, Navy officer; dependent mother. Findings of fact, conclusion of law, and judgment for $704.60.

No. 43287. FEBRUARY 8, 1937

James Gately.

Transportation of Navy officer's dependents. Findings of fact, conclusion of law, and judgment for $147.70.

No. 43327. FEBRUARY 8, 1937

Horace G. Trainer.

Transportation of Navy officer's dependents. Findings of fact, conclusion of law, and judgment for $109.95.

No. 43361. FEBRUARY 8, 1937

Franklin D. Karns.

Transportation of Navy officer's dependent. Findings of fact, conclusion of law, and judgment for $135.09.

No. 261–A. FEBRUARY 8, 1937

David A. Wright.

Validity of special jurisdictional act for reinstatement and rehearing of an adjudicated case. Petition for reinstatement denied.

No. 43244. MARCH 1, 1937

Stephen N. Tackney.

Rental and subsistence allowances, Navy officer; dependent mother. Findings of fact and conclusion of law; plaintiff entitled to recover. Judgment suspended pending report of General Accounting Office as to amount due.

No. 42828. MARCH 1, 1937

Percy K. Hudson.

Refund of silver-transfer tax. Order vacating former judgment for plaintiff (82 C. Cls. 15) and dismissing the

petition, on mandate of the Supreme Court reversing the Court of Claims, 299 U. S. 498.

No. 43399. MARCH 1, 1937

Delaware Tribe of Indians.

Treaty annuities. Dismissed on defendant's motion, on authority of *Delaware Tribe of Indians* v. *United States*, No. 43396, *ante* p. 535.

No. M–239. APRIL 5, 1937

R. J. Bartholomew.

Commutation of quarters, officer of Marine Corps, in service in China. Findings of fact, conclusion of law, and judgment for $456.00, on authority of *Montague* v. *United States*, 79 C. Cls. 624.

No. 42838. APRIL 5, 1937

Gladys Cornet DeWays-Ruart.

Refund of income tax. Findings of fact and conclusion of law; petition dismissed on authority of *McMillan* v. *United States*, *ante*, p. 580.

No. 42840. APRIL 5, 1937

James T. McMillan.

Refund of income tax. Findings of fact and conclusion of law; petition dismissed on authority of *McMillan* v. *United States*, *ante*, p. 580.

No. 42841. APRIL 5, 1937

Edwin K. Hoover et al., Executors of Doris McMillan Hoover.

Refund of income tax. Findings of fact and conclusion of law; petition dismissed on authority of *McMillan* v. *United States*, *ante*, p. 580.

No. 42857. APRIL 5, 1937

Raymond L. Keith, Admr. of Estate of William H. Keith.

Longevity pay, Army officer. Findings of fact and conclusion of law; petition dismissed on authority of *Scholl* v. *United States*, 82 C. Cls. 606.

No. 43183. April 5, 1937

Julia Henderson, Parker A. Henderson, Jr., and A. J. Henderson, Distributees of the Estate of Parker A. Henderson, Deceased.

Refund of estate tax. In accordance with its opinion of March 1, 1937, in the case, *ante*, p. 525, the Court rendered judgment for plaintiffs in the sum of $6,550.84, together with interest thereon in accordance with section 614 of the Revenue Act of 1928, as follows:

On $780.37 from October 1, 1931.
On $1,248.70 from October 29, 1931.
On $1,000 from November 5, 1931.
On $1,000 from December 26, 1931.
On $1,250 from January 20, 1932.
On $1,271.77 from February 9, 1932.

In the computation of the judgment, allowance was made for an item of $4,583.33 agreed to have been erroneously excluded by the Commissioner of Internal Revenue from the decedent's gross estate on account of certain parcels of jointly owned real estate.

No. L–383. April 5, 1937

Ernest M. Bull, Surviving Executor and Trustee of the Estate of Archibald H. Bull, deceased.

Refund of income and estate taxes. On Mandate of the Supreme Court (opinion 295 U. S. 247) reversing the decision of the Court of Claims, 79 C. Cls. 133. The court entered the following

JUDGMENT

Pursuant to and in conformity with the opinion and mandate of the Supreme Court, judgment is entered in favor of plaintiff for $22,350.15 with interest based on the following correct computations of estate tax due upon the net estate of Archibald H. Bull and the income tax due by the estate upon its correct net income for the period February 13 to December 31, 1920:

Computation of Estate Tax

Net estate previously determined		$3,066,419.82
Less: Earnings of the partnership subsequent to the death of the decedent which were erroneously included in the gross estate for estate tax purposes		211,078.73
Revised net estate		$2,855,341.09
Estate tax paid (net)	$312,127.17	
Total correct estate tax	281,247.75	
Excess collection		$30,879.42
Interest on $30,879.42 from August 10, 1921, date of payment, to April 14, 1928, date of collection of income tax against which the estate tax is to be applied as a credit		12,372.09
Total excess collection and interest		$43,251.51

Computation of Income Tax for period from February 13 to December 31, 1920

Net income as previously determined		$211,054.63
Add: Excess deduction for estate tax—		
Previously deducted	$312,127.17	
As corrected	281,247.75	
		30,879.42
Corrected net income		$241,934.05
Total income tax		$102,870.43
Total income tax paid		84,142.78
Additional income tax due		$18,527.65
Interest on $18,527.65 from February 26, 1926, the date of the passage of the Revenue Act of 1926, to April 14, 1928, the date of the payment of the deficiency under the Board's decision		2,373.71
Total additional tax and interest		$20,901.36

The recoupment or offset for which plaintiff is entitled under the opinion and mandate of the Supreme Court to have judgment entered in his favor is $22,350.15, being the difference between $43,251.51, the excess collection of estate tax with interest, and $20,901.36, the deficiency in income tax with interest.

It is therefore ordered, adjudged, and decided that plaintiff recover of and from the United States Twenty-two thousand three hundred fifty dollars and fifteen cents ($22,350.15) with interest at 6% per annum from April 14, 1928, to such date as the Commissioner of Internal Revenue may determine in accordance with section 177 (b) of the Judicial Code as amended by the Revenue Act of 1928.

No. J-248. APRIL 13, 1937

Grover Bohannon.

Army pay, World War. Judgment for $314.50. Findings of fact and opinion, June 1, 1936, 83 C. Cls. 423.

COTTON LINTER CASES

In the following cases involving claims for damages for breach of World War contracts for cotton linters, judgments against the Government were rendered as indicated, on authority of *Farmers & Ginners Cotton Oil Co.* v. *United States*, 76 C. Cls. 294, following *Hazelhurst Oil Mill & Fertilizer Co.* v. *United States*, 70 C. Cls. 334, and *Hartsville Oil Mill* v. *United States*, 271 U. S. 43.

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No. 17416, Congressional. J. W. Herren, Receiver for Rutledge Oil Co., $1,796.01.

No. 17605, Congressional. Schulenburg Oil Mill, Gustav A. Baumgarten, Sole Owner, to use of Schulenburg Oil Mill, Inc., $229.90.

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No. 17342, Congressional. Little Rock Cotton Oil Mill, to use of Swift & Co., $11,393.44.

No. 17417, Congressional. J. W. Conway, Receiver of International Vegetable Oil Co. (Savannah Plant), $26,611.63.

No. 17429, Congressional. Harold Hirsch, Trustee of Alexandria Cotton Oil Co., $28,092.53.

No. 17490, Congressional. J. W. Conway, Receiver of International Vegetable Oil Co. (Raleigh Plant), $15,689.20.

No. 17546, Congressional. Shelby County Cotton Oil Mill, to use of Swift & Co., $22,334.90.

No. 17561, Congressional. J. W. Conway, Receiver of International Cotton Oil Co. (Dallas Plant), $5,719.70.

No. 17568, Congressional. Fort Worth Cotton Oil Mill, to use of Consumers Cotton Oil Mills, not Incorporated, $4,657.89.

No. 17569, Congressional. Gatesville Cotton Oil Mill, to use of Consumers Cotton Oil Mills, not Incorporated, $2,538.04.

No. 17577, Congressional. Bencini Cotton Oil Mills, to use of Consumers Cotton Oil Mills, not Incorporated, J. G. Smithwick et al., Trustees, $3,848.13.

No. 17578, Congressional. Houston Cotton Oil Mill, to use of Consumers Cotton Oil Mills, not Incorporated, $12,148.85.

No. 17579, Congressional. J. W. Conway, Receiver of International Vegetable Oil Co. (Houston Plant), $9,352.34.

No. 17603, Congressional. Alamo Oil & Refining Co., to use of Consumers Cotton Oil Mills, not Incorporated, William B. Traynor, et al., Trustees, trading as Alamo Cotton Oil Mill, not Incorporated, $11,865.09.

No. 17613, Congressional. W. P. Allen, Liquidating Agent of Terrell Oil & Refining Co., Successor to Terrell Cotton Oil Co., $3,015.18.

No. 17619, Congressional. Waco Cotton Oil Mill, to use of Consumers Cotton Oil Mills, not Incorporated, $21,857.42.

APRIL 5, 1937

No. D–1104. Texas Refining Co., $5,836.56.

No. 17348, Congressional. Roberts Cotton Oil Co. (Jonesboro Plant), $11,181.14.

CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR OF THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

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K–487. Graton & Knight Co. et al.
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42671. Mary D. A. Sayles.
42860. Mary D. A. Sayles.
43167. Mary D. A. Sayles.
42657. T. G. McCreary.
42481. Charles Amicon.

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42867. Shore Bungalows, Inc.
42949. Erie Equity Owners, Inc.
42950. National Foods, Inc.
43121. Metropolitan Company.
43132. George W. Martin.
43279. Manufacturers Trust Co.

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42021. Missouri State Life Insurance Co.
42702. Lackawanna Steel Co.
43054. Louis Berman.

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42106. Monarch Brewing Co.
43249. Driver-Harris Co.
43299. Therese Hewitt Mitchell.

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L-489. Lowber Gas Coal Co.
42108. The Commonwealth of Massachusetts.
42161. R. J. Reynolds Tobacco Co., on Behalf of Commonwealth of Massachusetts.
42309. The Commonwealth of Massachusetts.
42310. Liggett & Myers Tobacco Co., on Behalf of Commonwealth of Massachusetts.
42935. Ridgewood Cemetery Co., Inc.
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D-1070. Gainesville Cotton Oil Co. Cotton linters.
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ABSTRACT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

UNITED STATES v. ROBERT ESNAULT-PELTERIE

[81 C. Cls. 785; 299 U. S. 201]

Certiorari to review a judgment of the Court of Claims on a claim for infringement of a patent.

Judgment was rendered in favor of the plaintiff in the Court of Claims, holding the plaintiff's patent valid, and infringed by the United States, but findings of validity and infringement of the patent were not included in the court's special findings of fact. Upon certiorari the case was *remanded*, December 7, 1936, for specific findings by the Court of Claims on these questions, the Supreme Court holding:

1. In a suit in the Court of Claims to recover damages under the Act of June 25, 1910, for alleged infringement of the plaintiff's patent, the validity of the patent and infringement of it are ultimate facts upon which depends the question of liability.
2. Where in such a suit the Court of Claims makes findings of circumstantial facts, but fails to find specifically that the patent was valid or that it was infringed, its judgment for the plaintiff cannot be sustained unless, upon inspection of the findings of fact made, it is plain that they suffice to compel decision of those ultimate issues—validity and infringement—in favor of the plaintiff.
3. The failure of the Court of Claims to make specific findings upon the main issues of validity and infringement does not lay upon this Court the duty of examining, analyzing, and comparing the circumstantial facts found, to ascertain whether, as a matter of law, they establish validity and infringement.

4. Special findings of fact may not be aided by statements in the conclusions of law or the opinion of the Court of Claims to the effect that the patent is valid and infringed.

Mr. Justice Butler delivered the opinion of the court.

CONTINENTAL MILLS, INC., v. UNITED STATES

[*Ante*, p. 247; 299 U. S. 614]

Petition for certiorari *denied* by the Supreme Court, January 4, 1937.

LIGGETT & MYERS TOBACCO CO. v. UNITED STATES

COMMONWEALTH OF MASSACHUSETTS v. UNITED STATES

LIGGETT & MYERS TOBACCO CO., ON BEHALF OF COMMONWEALTH OF MASSACHUSETTS v. UNITED STATES

[82 C. Cls. 328; 299 U. S. 383]

Certiorari to review judgments of the Court of Claims dismissing the plaintiffs' petitions in suits for refund of taxes.

The judgments of the Court of Claims were *affirmed*, January 4, 1937, the Supreme Court deciding:

1. The tax imposed by § 401 (a) of the Revenue Act of 1926 is a tax upon the *manufacture*, not upon the sale, of tobacco.
2. As applied to tobacco purchased by a State for use in a hospital owned and maintained by the State, the effect is indirect and imposes no prohibited burden.
3. It is unnecessary in this case to decide whether in the operation of the hospital the State is exerting a governmental function.

Mr. Justice McReynolds delivered the opinion of the court.

UNITED STATES v. SEMINOLE NATION

[82 C. Cls. 135; 299 U. S. 417]

Certiorari to review a judgment of the Court of Claims allowing certain claims of the Seminole Nation of Indians in a suit against the United States.

The judgment of the court was *reversed*, January 4, 1937, the Supreme Court deciding:

1. A second motion for new trial made by the United States, by leave of the Court of Claims, *held* to have been filed under Rule 91 of the Court of Claims, requiring leave of court, and not under 28 U. S. C., § 282; Jud. Code, § 175.
2. The time within which application may be made to this Court for review by certiorari does not commence to run until after disposition of motion for a new trial seasonably filed and entertained.
3. The Court of Claims is without jurisdiction to adjudicate clauses of action against the United States which were introduced into the claimant's petition by amendment after the expiration of the time for beginning suit as limited by the jurisdictional statute.
4. A judgment of the Court of Claims may not be sustained as to any item that was not included in a cause of action set up in a petition filed within the time allowed by statute, or that was, by the findings or otherwise, put upon a ground not alleged in a petition so filed.
5. A judgment of the Court of Claims may not be upheld as to any item that is not supported by definite findings of fact extending to all essential issues and which, unaided by statements in the court's conclusions of law or its opinion, are clearly sufficient to entitle plaintiff to recover.
6. Under Acts of Congress authorizing suit in the Court of Claims, to be commenced before a day prescribed, the Seminole Nation filed, in time, a petition seeking recovery, with interest, of tribal funds alleged to have been spent by the Government since July 1, 1898, without authority from Congress and in violation of its duty as trustee and of treaties and agreements with the tribe. The petition was amended after the limitation period had expired. *Held:*

(1) That a judgment for the plaintiff could not be sustained in so far as it included:

(a) Various items outside of the period alleged in the original petition, or not shown by the findings to be included in any cause of action alleged in the original petition to have accrued in that period.

(b) Interest on a tribal fund, appropriated by Congress for the purpose of making per capita payments, and alleged not to have been disbursed to members or paid to the tribal treasurer, but not found to have been disbursed or spent illegally.

(c) An amount, which was disbursed as per capita payments from capital previously set apart as a permanent school fund.

(d) Amounts disbursed out of the principal of that fund, for education.

(2) Payments out of the Seminole school fund, for equalization of allotments not otherwise "authorized by law" were not permitted by the Indian Appropriation Act of February 14, 1920; and their amount was properly included in the judgment in this case.

7. In the process of liquidating the affairs of the Seminole Nation, Congress, by § 18 of the Indian Appropriation Act of May 25, 1918, authorized the Secretary of the Interior to make per capita payments to enrolled Seminoles, or their lawful heirs, out of the Seminole school fund; and the authority was not confined to the particular fiscal year.
8. The Indian Appropriation Acts for the years 1922–1930, authorizing the Secretary of the Interior to continue Seminole schools with tribal funds, were passed by Congress with knowledge that the fund in pursuance of its authority had been so depleted that interest on the amount remaining in it would not meet even the lessened requirements; and are to be construed as contemplating the use of not merely the interest on the diminished school fund but of the principal also.

Mr. Justice Butler delivered the opinion of the court.

SHOSHONE TRIBE OF INDIANS v. UNITED STATES

UNITED STATES v. SHOSHONE TRIBES OF INDIANS

[82 C. Cls. 23; 299 U. S. 476]

Cross-writs of certiorari to review a judgment of the Court of Claims awarding the Shoshone Tribe of Indians compensation for the taking of a half interest in their reservation.

The judgment of the Court of Claims was *reversed*, January 4, 1937, the Supreme Court deciding:

1. A taking of an interest in land, tortious in its origin, may be made lawful by relation.
2. A taking of land may be partial, not involving complete eviction.
3. The right to interest, or a fair equivalent, attaches automatically to an award for damages for an expropriation of property, though not specified in the Act of Congress permitting the suit.
4. The guardianship of the United States over the property and affairs of tribal Indians does not enable the Government to require a tribe to which an exclusive right of occupancy has been pledged by treaty, to share it with another tribe without just compensation.

5. By treaty of July 3, 1868, a reservation was set apart for the Shoshone Indians exclusively. On March 18, 1878, a band of Arapahoes, under military escort, settled upon the land; others did so later. These intrusions were directed or sanctioned by the Commissioner of Indian Affairs, with intent that the settlements should be permanent; and from then on, in the administrative way, he treated the two tribes as equal beneficiaries of the reservation—a view which at length found sanction in Acts of Congress dealing with cessions of land and with the privilege of allotment in severalty. The Shoshones, however, protested consistently against the invasion of their rights, and finally secured from Congress the jurisdictional Act of March 3, 1927, under which they presented to the court below their claim for compensation for the taking of an undivided one-half interest in their tribal lands. *Held:*

(1) That the jurisdictional Act is not an exercise of eminent domain, although it provides that a recovery under it shall be in full settlement and shall annul the claim of the Shoshones. Consequently the date of that Act is not the time as of which the property taken should be valued in assessing compensation.

(2) Neither are the damages to be measured as of a date (Aug. 13, 1891) when the Commissioner of Indian Affairs expressed in an official letter his opinion that the rights of the two tribes to the reservation were equal.

(3) By the action and inaction of the executive and legislative branches of the Government, the *de facto* appropriation, originally tortious, was ratified, and the ratification relates back to the date of the original unlawful entry, March 18, 1878.

(4) Damages should be measured as of that date.

(5) The claimant's damage includes such additional amount beyond the value of its property rights when taken by the Government as may be necessary to the award of just compensation, the increment to be measured either by interest on the value or by such other standard as may be suitable in the light of all the circumstances.

Mr. Justice Cardozo delivered the opinion of the court.

UNITED STATES v. PERCY K. HUDSON

[82 C. Cls. 15; 299 U. S. 498]

Certiorari to review a judgment of the Court of Claims for refund of a silver-transfer tax.

The judgment of the court was *reversed*, January 11, 1937, the Supreme Court deciding:

The Silver Purchase Act of June 19, 1934, imposed on transfers of any interest in silver bullion a tax of 50% of the profits over cost and allowed expenses, payable as to future transfers by attaching stamps to the memoranda of sale. Transfers made on or after May 15, 1934, and prior to the date of the Act were also subjected to the tax, payable, however, in a different way. *Held:*

1. That the tax is a special income tax.
2. Congress had power to impose this tax in addition to the tax imposed on the same profits, with other gains, under the general income tax law.
3. Making the tax provision retroactive for a period of 35 days, to include profits from transactions consummated while the statute was in course of enactment, was consistent with due process.

Mr. Justice Van Devanter delivered the opinion of the court.

L. GORDON HAMERSLEY v. UNITED STATES

[83 C. Cls. 687; 300 U. S. 659]

Petition for certiorari *denied* by the Supreme Court, February 8, 1937.

S. DAVIS WILSON ET AL., TRUSTEES FOR PHILADELPHIA RAPID TRANSIT CO., v. UNITED STATES

[81 C. Cls. 289; 300 U. S. 664]

Petition for certiorari *denied* by the Supreme Court, March 1, 1937.

CHARLES H. HUBBARD v. UNITED STATES

[*Ante*, p. 205; 300 U. S. 666]

Petition for certiorari *denied* by the Supreme Court, March 1, 1937.

CHARLES H. HUBBARD v. UNITED STATES

[*Ante*, p. 213; 300 U. S. 666]

Petition for certiorari *denied* by the Supreme Court, March 1, 1937.

UNITED STATES v. AUTOMATIC WASHER CO.

[83 C. Cls. 593; 300 U. S. 268]

Certiorari to review a judgment of the Court of Claims against the United States on a claim for refund of taxes.

The Judgment of the court was *reversed*, March 1, 1937, the Supreme Court deciding:

1. Where the certificates for corporate shares subscribed for by A are, by his direction and for his own convenience, issued to B, his nominee and agent for this purpose, there is a transfer from A to B of the "right to receive" the certificates which is taxable under § 800, Schedule A-3 of the Revenue Act of 1926, although the arrangements between A and B were such that, as against A, B could not have compelled issuance of the certificates to himself and acquires no beneficial interest in the securities and has no part in the management or disposal of them.
2. A new corporation took over the assets of an old one and agreed to issue its shares to the old stockholders, but in pursuance of an irrevocable agreement and power of attorney previously executed by the stockholders, portions of their new allotments, *pro rata*, were issued directly to their attorney for purposes of sale. *Held* that there was a taxable transfer, from stockholders to attorney, of the "right to receive" shares, under § 800, Schedule A-3 of the Revenue Act of 1926. *Raybestos-Manhattan, Inc.* v. *United States*, 296 U. S. 60.
3. A taxpayer whose transaction is within a taxing statute cannot be relieved upon the ground that by adopting another form of dealing he could have achieved his ultimate purpose and avoided the statute.

Mr. Justice Brandeis delivered the opinion of the court.

CHOCTAW NATION v. UNITED STATES

[83 C. Cls. 140; 300 U. S. 668]

Petition for certiorari *denied* by the Supreme Court, March 8, 1937.

HALSTEAD L. RITTER v. UNITED STATES

[*Ante*, p. 293; 300 U. S. 668]

Petition for certiorari *denied* by the Supreme Court, March 8, 1937.

E. PENNINGTON PEARSON, ADMR. v. UNITED STATES

[83 C. Cls. 624; 300 U. S. 678]

Petition for certiorari *denied* by the Supreme Court, March 29, 1937.

ALBERT R. KLEIN v. UNITED STATES

[83 C. Cls. 702; 300 U. S. 678]

Petition for certiorari *denied* by the Supreme Court, March 29, 1937.

CENTRAL HANOVER BANK & TRUST CO., TRUSTEE, v. UNITED STATES

[83 C. Cls. 401; 300 U. S. 678]

Petition for certiorari *denied* by the Supreme Court, March 29, 1937.

BURDINE C. ANDERSON, ET AL., TRUSTEES, v. UNITED STATES

[83 C. Cls. 561; 300 U. S. 675]

Petition for certiorari *denied* by the Supreme Court, March 29, 1937.

AMERICAN PROPELLER AND MANUFACTURING CO. v. UNITED STATES

[83 C. Cls. 100; 300 U. S. 475]

Certiorari to review a judgment of the Court of Claims allowing interest on the Government's counterclaim for deficiency income and excess profits tax assessments.

The judgment of the court was *reversed*, March 29, 1937, the Supreme Court deciding:

1. Where the United States comes into court to assert a claim, it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.

2. The absence of legal liability in a case where but for its sovereignty the Government would be liable, does not destroy the justice of the claim against it. The reasons are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest.
3. The inequity and injustice of allowing the Government interest for a period of years where it at the same time was indebted to the plaintiff on its claim in a much larger sum upon which it could not recover interest is so gross as to be shocking, and should not be approved unless under plain compulsion of law.
4. While the court is not at liberty to refer to the opinion of the Court of Claims for the purpose of eking out, controlling or modifying the scope of its findings of fact, it may resort to the opinion in case of ambiguity in order to clarify the meaning of a finding otherwise in doubt.
5. Where, in a suit in the Court of Claims, the relevant statutes provided for the payment of interest on unpaid taxes remaining unpaid "for ten days after notice and demand by the collector", and there was no allegation of such demand in the Government's counterclaim for such taxes, and the court's findings of fact merely stated that the Commissioner of Internal Revenue made the assessment "and duly notified the plaintiff with regard thereto", without any finding of demand, and the court in its opinion stated that "the record fails to show that any demand was made"; the findings of fact cannot, upon the basis of presumption of official regularity, be construed as finding such demand to have been made.

Mr. Justice Sutherland delivered the opinion of the court.

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CONGRESSIONAL REFERENCE—Continued.
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CONTRACTS.

I. Where a contract for designing and production by the plaintiff of a number of airplanes of a particular type for the Government provided that as a further consideration for the planes in addition to the fixed base price specified in the contract the Government should pay the plaintiff certain percentages of the prices or cost of any planes of the same design thereafter manufactured by or for the Government, there was a sufficient consideration for such contingent additional compensation. *Glenn L. Martin Co.*, 54

II. A contingent fee to a contractor is valid where there has been a valuable consideration therefor and the contractor has performed his part of the contract. *Id.*

III. Where the specifications of the Government contract for construction of fenders for the navigation channel through the draw span of the Arlington Memorial Bridge provided that bidders for the work should examine and inform themselves as to the situation, conditions and difficulties of the work, including conditions due to work performed by other contractors, and that no allowance would be made by the Government for failure correctly to estimate the difficulties attending the performance of the contract, and there was no misrepresentation or misleading action on the part of the Government, the contractor is not entitled to extra compensation for work resulting from subsurface obstructions of which it did not have knowledge but of which it could have informed itself by reasonable prior investigation of the site of the work. *Triest & Earle*, 84.

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CONTRACTS—Continued.

IV. The plaintiff, a contractor for Government construction work, is entitled to recover for damage sustained by it as a result of delay in the performance of the Government's obligations under the contract; and it is immaterial that the contractor, in subsequent unsuccessful negotiations to secure payment of other claims under the contract, stated that no claim was made for such damage. *Karno-Smith Co.*, 110.

V. The mere fact that the time for completion of the plaintiff's contract for Government construction work was extended because of delay caused by the Government does not relieve the Government of liability for damage sustained by plaintiff as a result of such delay. *Id.*

VI. Where the Government fails in carrying out its agreement to perform certain work or to furnish articles necessary to the performance of a Government contract, it is liable for actual damage sustained by the contractor as a result thereof. *Id.*

VII. The contractor in a Government contract had a right to assume that the specifications of the contract as drawn by the Government complied with the municipal code of the city in which the contract work was to be performed; and where they did not, and the contractor, under instructions from the contracting officer, and at an increased cost, modified and performed the work so as to comply with the municipal regulations, and the work and its benefits were accepted by the Government, the contractor was entitled to compensation for such increased cost. *Id.*

VIII. Where, under its contract with the Government for construction of a building, the plaintiff was required to furnish heat for protection of the work against cold over an increased period of time by reason of delay in completion of the work caused by the Government, it was entitled to compensation for the cost of such additional heat. *Id.*

IX. Where a Government contract properly provided for the determination of disputed questions by a specified Government officer, who, instead of deciding such questions, refers them to the Comptroller General for his decision, the Comptroller General's decision cannot be substituted for that of the officer designated by the contract, and the legal rights of the contractor are determinable by the court. *Id.*

CONTRACTS—Continued.

X. Where the Government contracted for sale to the plaintiff of all surplus unused trench shoes belonging to it, delivery and payment to be made over a period of five years, and the Government subsequently, during such period, withdrew and made other disposition of a large quantity of such shoes, it constituted a breach of the contract by the Government which entitled the plaintiff to terminate the contract and to recover for the damage sustained by it as a result of the breach and termination of the contract, the measure of such damage being the difference between the contract price and the fair and reasonable market value of the shoes remaining undelivered at the time of the termination of the contracts. *Georgia Wholesale Co.*, 150.

XI. Where one party to a contract prevents its performance, or puts it out of his own power to perform in accordance with its terms, the other party may regard the contract as terminated and demand whatever damage he has sustained by reason of its termination. *Id.*

XII. Where the entire quantity of surplus unused Government trench shoes was offered and sold to the plaintiff as a whole, the contract of sale was not divisible because of the contract price being fixed at a certain price per pair for the shoes; the fixing of a price per unit for the ascertainment of compensation as a whole does not render a contract severable. *Id.*

XIII. In a suit against the Government for damage for breach of contract, there can be no recovery by the plaintiff, as an item of such damage, of money paid the Government in connection with the execution of the contract in suit, but in compromise and settlement of claims and counterclaims under a prior contract with the Government, and which payment had no connection with the performance or nonperformance of the contract in suit. *Id.*

XIV. Where a contract for sale by the Government to the plaintiff of certain surplus property being acquired by plaintiff for resale was terminated as a result of a breach by the Government, there can be no recovery by plaintiff on account of expenses incurred by it in carrying on its business of reselling such property unless it be shown that some portion of such expenses was incurred in respect of and was directly related to the portion of the contract remaining unperformed at the time of the breach and termination of the contract. *Id.*

CONTRACTS—Continued.

XV. Where a Government contract for ocean transportation of mails on not to exceed 26 voyages during the year ending June 30, 1928, was on June 19, 1928, extended under the provisions of section 414 of the Merchant Marine Act of 1928 for an indefinite period not exceeding one year, the extension period began July 1, 1928, and compensation for transportation of the mails on an additional, or 27th voyage, in June 1928, was controlled by, and payable under, either the original contract or the extension thereof. *Dollar Steamship Lines*, 346.

XVI. Where in a contract for furnishing certain supplies for the Navy Department the contractor objected to rejections by the Government of certain shipments of such supplies for failure to meet the contract requirements, but failed to appeal from such rejections as provided for by the contract, and refused further performance, his action constituted a breach of the contract and rendered him liable to the Government therefor. *American Sanitary Rag Co.*, 417.

XVII. Where, in a contract for furnishing stenographic services for the Government, there was a disagreement between the Government and the contractor as to whether the compensation provisions of the contract applied to a certain class of the services performed, and an additional agreement was entered into fixing the compensation for such services, this agreement controlled as to the compensation due for the services. *Cooper*, 436.

XVIII. It is well settled that an exchange of letters may constitute a valid contract between the parties to the correspondence. *Id.*

XIX. Parole evidence is inadmissible to add to or alter in any way the terms of a written agreement. *Id.*

XX. Where a contract for purchase of Government timber was for all of certain kinds of timber on a specified area, estimated quantities of which were stated in the contract, the contract was for all of the specified timber on the area, and was not for, or limited by, such estimated quantities. *Brock et al.*, 453.

XXI. Where the plaintiff contracted to furnish coal to the Government the ash content of which was specified at 9 per cent, with reductions in price in case the ash exceeded by more than 2 per cent the specified 9 per cent, the Government was entitled to the specified reduction in price where the ash exceeded over 12 per cent; and it was immaterial that plaintiff prior to the execu-

CONTRACTS—Continued.
tion of the contract told the Government's officials an error had been made in the bid. *Perryman-Burns Coal Co.*, 567.

XXII. The elimination by the Government of a large and independent part of a Government construction contract was not a change in the drawings or specifications of the contract within contemplation of a provision of the contract for Government "changes in the drawings and (or) specifications" of the contract, but amounted to a cardinal change or alteration of the contract itself, and constituted a breach of the contract by the Government for which the contractor was entitled to its damages resulting therefrom. *General Contracting and Construction Co.*, 570.

See also Taxes, XXXI.

COUNTERCLAIM.
See Set-Off and Counterclaim.

CREDIT FOR FOREIGN-PAID TAX.
See Taxes, XVI, XVII, XXXV, XXXVII, LXXXI.

CRIMINAL LIABILITY.
See Taxes, XXVI.

DAMAGES.
See Contracts, IV, V, VI, VIII, X, XI, XIII, XIV, XXII; Evidence, II, III; Indians, IV.

DECISION OF OFFICER.
See Contracts, IX; Taxes, XXXIII, LXXIV.

DECLARATION OF DIVIDENDS.
See Taxes, XXI.

DEDUCTIBLE LOSS.
See Taxes, XXXII, LIV, LXIII.

DEDUCTIONS FROM INCOME.
See Taxes, IX, X, XI, XII, XXXII, L, LII, LIII, LIV, LV, LXII, LXIII.

DEFICIENCY TAX NOTICE.
See Taxes, V, VI, XIII.

DELAY.
See Contracts, IV, V, VIII.

DELEGATION OF AUTHORITY.
See Contracts IX; Sale of Surplus Property; Taxes, III, XLV, LX.

DEPARTMENTAL REFERENCE.
See Jurisdiction, VI.

DEPRECIATION OF ASSETS.
See Taxes, XXXII, LIV.

DISCRETION OF OFFICER.
See Taxes, XXXIII, LXXIV.

DISTRIBUTION OF ESTATE.
See Administration of Estate, II.

DIVIDENDS TAX.
See Taxes, XXI, LVII, LVIII.
DOUBLE LIABILITY.
See Taxes, XXVI.
DOUBLE TAXATION.
See Taxes, XVI.
EMINENT DOMAIN.
I. Just compensation for private property taken by the Government for public use is the value of the property at the time of the taking when payment is made contemporaneous with the taking; and where compensation is not made until a later time, the owner is entitled to such addition to this value as will produce the full equivalent of the value paid contemporaneously with the taking, and interest at a proper rate during the time payment was delayed is a good measure of such addition. *De Luca*, 217.
II. Where private property taken for public use had an established market value at the time of the taking, the price current in such market will be regarded as its fair market value, and likewise the measure of just compensation for the property, at the time taken. *Id.*
ESTATE TAX.
See Taxes, LXIV, LXV, LXIX, LXX, LXXI, LXXII, LXXIII.
ESTOPPEL.
See Taxes, II, XLIV, LXVIII.
EVIDENCE.
I. The character and disposition of aboriginal Indians may not be ignored in the consideration of the evidence in Indian litigation. *Sioux Tribe of Indians*, 16.
II. The court is without jurisdiction to award nominal damages. In order to recover damage the plaintiff must establish a pecuniary loss, one capable of being reduced to dollars and cents with reasonable certainty. *Id.*
III. It has long been the law that damages may be recovered for breach of contract even if they cannot be calculated with absolute exactness, but the courts have not abandoned the rule that in order to recover damages the plaintiff must prove a reasonable basis for computations relied upon; the proofs must establish facts which convince the court that computations essentially hypothetical in their nature exclude speculation and conjecture and bear a direct relationship to the amount of the damages to be awarded. *Id.*
IV. An estimate, to form the basis for a money judgment, must of necessity be predicated upon fundamental facts which import to it a degree of verity and reasonableness. Its origin and development must disclose

EVIDENCE—Continued.

to a convincing extent that the figures given do not involve the court in indulging in conjecture and speculation as to the true or possible situation in the premises. *Id.*

See also Contracts, XIX; Pleading and Practice, II.

EXCHANGE OF STOCK.

See Taxes, XXII.

EXCISE TAX.

See Taxes, XIX, XX, XXI.

EXEMPTION FROM TAXATION.

See Taxes, XXIII, XXIV

EXTENSION OF CONTRACT.

See Contracts, XV.

EXTRA COMPENSATION.

See Contracts, III, VII, VIII.

EXTRA WORK.

See Contracts, III, VII, VIII.

FIELD DUTY.

See Pay and Allowances, IV.

FIFTH AMENDMENT TO CONSTITUTION.

See Taxes, XXVI.

FOREIGN-PAID TAX.

See Taxes, XVI, XVII, XXXV, XXXVII, LXXXI.

FORFEITURE OF CLAIM.

See Subrogation, II, III.

FRAUD.

See Subrogation, II, III.

GENERAL AVERAGE.

I. Where the Government, being under legal obligation for transportation of an Army officer's property on his change of station, and with full authority to determine the method and route of shipment, made the shipment, for the purpose of Government economy, partly by rail and partly by water instead of by the much shorter all-rail route, and without insurance or other protection against marine risk, it is liable to the officer for contribution in general average accruing against the property or officer as a result of marine loss incident to such shipment; and it is immaterial to the officer's right of recovery that such general average contribution has not yet been paid by him. *Hodges*, 380.

II. Where the Government, under its obligation for transportation of personal property of an Army officer on his change of station, ships the property partly by water, general average contribution accruing against the property or officer as a result of marine loss inci-

GENERAL AVERAGE—Continued.
dent to such transportation may properly be considered a contingent part of the cost of the transportation, and of the Government's liability therefor. *Id.*

GOVERNMENT DELAY.
See Contracts, IV, V, VIII.

IMPEACHMENT.
See Jurisdiction, IV, V.

IMPLIED CONTRACT.
See Taxes, XLVIII.

INCOME "IN POSSESSION OR ENJOYMENT".
See Taxes, XXXVIII, XXXIX.

INCOME TAX.
See Taxes.

INFORMAL CLAIM FOR REFUND.
See Taxes, LXXV, LXXVI, LXXVII.

INDIANS.

I. Under the ruling of the Supreme Court (295 U. S. 103), *held*, that the taking of the land in question by the Government was effected by the Act of Congress of February 13, 1891, directing its disposal by the Government; and that just compensation therefor was the value of the land as of that date, with such additional sum as would make "just compensation" at the delayed date of payment, which was held to be five per cent per annum on such value from the date of the taking. *Creek Nation*, 12.

II. The provisions of the treaty between the Government and the plaintiff tribe of Indians for furnishing school buildings and teachers by the Government and requiring school attendance by the children of the tribe did not constitute a unilateral contract obligating the Government alone, and the Government was under no obligation to furnish such educational facilities if children could not be induced or compelled to attend school. *Sioux Tribe of Indians*, 16.

III. Where the treaty between the Government and the plaintiff tribe of Indians provided for educational facilities to be furnished by the Government and for school attendance by the children of the tribe, the Government was as much interested as the Indian parents in the education of the children, to bring about their civilization. *Id.*

IV. The children of the plaintiff tribe of Indians were the ones who suffered substantial loss from lack of school facilities and attendance required by treaty for children of the tribe; and while the resulting lack in

INDIANS—Continued.

their education probably would result in a loss, in some degree, of civilizing influence on the tribe, the damage from such loss, in money, is one which in itself resists calculation. *Id.*

See also Evidence, I.

INDIAN TREATY.

See Indians, II, III, IV.

INTEREST.

I. Interest held not allowable on the portion of the claim based on contract. *Ordnance Engineering Corp.*, 1.

II. Where the Comptroller General under the act of March 3, 1875, as amended, withheld payment of money due a contractor under certain contracts with the Government to satisfy an erroneous claim against the contractor under another contract with the Government, the contractor is entitled to interest on the money so withheld from him. *Edwards*, 615.

See also Taxes, XIII, LXXII.

INTERNAL REVENUE.

See Taxes.

JURISDICTION.

I. The United States cannot be sued as of right; a plaintiff must bring his case within the authority of some act of Congress, and comply with the conditions prescribed by the statutes. *Continental Mills, Inc.*, 247.

II. The granting by Congress of a remedy by claim or suit against the Government confers no vested right in such remedy, and it may be changed, modified, or withdrawn at the pleasure of Congress. *Id.*

III. Where a suit for refund of processing taxes and the claim for refund upon which it was based complied with the statutory requirements at the time they were filed, but the plaintiff has failed to comply with subsequent additional statutory requirements as to claims and suits for refund, and proof of burden of tax, as prerequisites to the maintenance of claims or suits in all such cases, the court is without further jurisdiction in the case. *Id.*

IV. The provision of the Federal Constitution that the Senate should have the sole power to try all impeachments of Government officials was intended to mean that no other tribunal should have any jurisdiction in the trial of impeachment cases; and the courts are therefore without authority or jurisdiction to review or set aside the proceedings of the Senate in such cases. *Ritter*, 293.

JURISDICTION—Continued.

V. The court has no authority or jurisdiction to review the proceedings or judgments of the United States Senate in a case of impeachment of a judge of a United States court. *Id.*

VI. The Court of Claims has jurisdiction to render judgment in a claim before it on a departmental reference with the consent of the claimant and where it appears upon the facts that the court has jurisdiction under existing law to render judgment. *Hodges*, 380.

See also Congressional Reference, II, III, IV; Evidence, II; Special Jurisdiction, I, II; Statutes of Limitation, I, II; Subrogation, II, III; Taxes, XVIII, XXV, XXIX, XLIX.

JUST COMPENSATION.
See Eminent Domain, I, II; Indians, I.

LEGACY TAX.
See Taxes, XXXVIII, XXXIX.

LIQUIDATING DISTRIBUTION.
See Liquidation of Corporation.

LIQUIDATION OF CORPORATION.
See Taxes, XIV, XV, XL, XLII.

MARINE CORPS PAY.
See Pay and Allowances, IV.

MEASURE OF DAMAGES.
See Contracts, X.

MUTUAL INSURANCE COMPANY.
See Taxes, XXIII, XXIV.

NATIONAL INDUSTRIAL RECOVERY ACT.
See Taxes, XXI, XXIV.

NOMINAL DAMAGES.
See Evidence, II.

PARTY CLAIMANT.
See Taxes, LXXIII.

PATENTS.

I. The plaintiff, on September 16, 1918, filed an application for patent for aircraft control mechanism, which was placed under a secrecy order by the Commissioner of Patents on October 19, 1918, under the act of October 6, 1917 (40 Stat. 394). Following the signing of the Armistice, the secrecy order was, on January 18, 1919, rescinded, and after further proceedings in the Patent Office, notice of allowance of a patent on the application was given plaintiff on March 15, 1921. Plaintiff, however, permitted the application to become forfeited on September 15, 1921, for nonpayment of the

PATENTS—Continued.

required final fee for issuance of the patent, but subsequently, on January 9, 1923, renewed his application under section 4897 Revised Statutes, upon which the patent in suit was allowed and was issued to plaintiff on April 29, 1924. Plaintiff's petition, based upon the said act of October 6, 1917, was filed June 10, 1925.

Held: 1. The plaintiff's forfeiture of his original application for patent and the allowance and issuing of the patent on his second or renewed application under section 4897 Revised Statutes, takes the patent from under the act of October 6, 1917, and places it under the provisions of section 4897, which bars recovery for manufacture or use of the invention prior to the issue of the patent.

2. If an inventor's application for patent was placed under a secrecy order under the act of October 6, 1917, and was allowed, he could avail himself of the provisions of the act for compensation for use of the invention by obeying the order, paying the final fee and receiving the letters patent; but if this was not done, his rights and remedies for use of the invention reverted to and were governed by other applicable statutory provisions.

3. The plaintiff cannot recover under the act of October 6, 1917, for infringement, or use of the inventions of his patent, by the Government subsequent to the issuance of the patent on April 29, 1924, any right of action or recovery for such use being under the act of June 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 705). *Martin*, 41.

II. Plaintiff's patent No. 858875 for a "new and improved tent" held invalid for lack of novelty and invention, and not infringed by the Government. *Knabenshue*, 477.

III. A change in the placement of an element of an old device to a new place which does not alter the functioning of the device does not involve invention. *Id.*

IV. The mechanical difference between supporting the top cover and sides of a canvas tent by center poles without resorting to a block and tackle, and doing precisely the same thing by attaching to poles a block or blocks and tackle, a well known mechanical device, is so slight as to negative the exercise of invention. *Id.*

PAY AND ALLOWANCES.

I. The plaintiff, a field examiner in the United States Veterans' Bureau, with official post of duty at Louisville, Kentucky, was entitled to subsistence allowances while absent from Louisville on official business in Lexington, Kentucky, notwithstanding his home was in Lexington. *Anderson*, 146.

II. An Army officer proceeding to his home under orders to proceed there and await retirement was making a permanent change of station, and was therefore entitled to transportation for his dependents. *McCabe*, 291.

III. The plaintiff, a captain in the United States Army assigned to temporary duty with the Civilian Conservation Corps, and who, with other officers, occupied a tent as quarters from June 15th to November 11th, 1935, held entitled to rental allowances of an officer of his rank and pay during that period of time. *O'Mohundro*, 362.

IV. An officer of the United States Marine Corps, without dependents, on duty with United States troops in China in 1927–1928 protecting American lives and property during a period of disorder there, with friendly relations existing between such troops and the Chinese authorities and Government, was not on "field duty" within the meaning of the act of June 10, 1922, as amended, and the executive order of the President pursuant thereto, and was therefore entitled to rental allowances under said act. *Kalbfleish et al.*, 618.

PLEADING AND PRACTICE.

I. The forms of pleading in the Court of Claims are not of so strict a character as to preclude recovery of whatever is claimed and is justly due either party upon the facts shown; and where all the facts and questions are before the court, a set-off or counterclaim may be allowed by way of recoupment without any formal pleading thereof against a plaintiff who establishes his right to recover on his claim against the Government. *American Sanitary Rag Co.*, 417.

II. The filing of a counterclaim is the proper practice for recoupment by the Government against the plaintiff's claim in a suit where the claims of the parties grew out of different transactions; but where the Government's claim against the plaintiff was fully disclosed by the plaintiff's petition, the court will take cognizance of it without the filing of a counterclaim,

PLEADING AND PRACTICE—Continued.
and evidence was properly admitted in support of it by the commissioner of the court. *Id.*
See also Congressional Reference, III, IV; Set-off and Counterclaim.
POWER OF ATTORNEY.
See Taxes, XLV.
PROCESSING TAX.
See Jurisdiction, III; Taxes, XVII.
PROOF.
See Burden of Proof; Evidence; Indians, IV.
REFUND CLAIM.
See Claim for Refund.
REFUND OF PENALTIES.
See Taxes, XXVII, XXVIII, XXIX.
REJECTION OF CLAIM.
See Taxes, XLVII.
REMEDIAL STATUTES.
See Statutory Construction, II.
RENTAL AND SUBSISTENCE ALLOWANCES.
See Pay and Allowances.
REORGANIZATION OF CORPORATION.
See Taxes, XI, XXII.
REQUISITION OF PRIVATE PROPERTY.
See Eminent Domain.
RES ADJUDICATA.
See Taxes, VII, XXX.
RESERVE FOR BAD DEBTS.
See Taxes, XXXIII, XXXIV.
RETROACTIVE STATUTE.
See Taxes, LXXI, LXXII, LXXIII.
RIGHT OF ACTION.
See Subrogation, II.
SALE OF SURPLUS PROPERTY.
Where the Secretary of War was authorized by the statutes to sell surplus supplies under his control upon such terms as might be deemed best, he had authority, whether acting by himself or by others duly authorized and acting under and for him, to make such adjustments in sales of such supplies as were justified in the interest of fair dealing. *Georgia Wholesale Co.*, 150.
See also Contracts, XIV.
SET-OFF AND COUNTERCLAIM.
Where the Government withheld from the contract price due the plaintiff for performance of a contract a balance thereof equal to and in compensation for loss sustained by it through the plaintiff's default in performance of a prior contract, the

SET-OFF AND COUNTERCLAIM—Continued.
Government is entitled to recoup such loss by way of set-off in a suit by plaintiff for such balance of contract price withheld by the Government. *American Sanitary Rag Co.*, 417.
See also Pleading and Practice, I, II.
SETTLEMENT AGREEMENT.
See Taxes, XXXI.
SEVERABLE CONTRACT.
See Contracts, XII.
SIXTY-DAY DEFICIENCY NOTICE.
See Taxes, V, VI, XIII.
SOCIAL CLUB.
See Taxes XIX, XX.
SPECIAL JURISDICTION.
I. It is a long established precedent, from which the court may not depart, that special jurisdictional acts are not to be enlarged by implication or extended beyond the express letter of the grant. *Delaware Tribe of Indians*, 535.
II. The amendment of a special jurisdictional act in a minor or incidental matter bearing no relation to the jurisdiction or merits of the claims involved in the act, and without express language to show an intent to reenact the statute, did not constitute a reenactment of it, or revive a jurisdiction under it which had lapsed or become barred by the statute of limitations. *Id.*
See also Statutes of Limitation, I.
STATUTES CITED.
See ante, pp. XXI–XXIII.
STATUTES OF LIMITATION.
I. The statute of limitations applies to special jurisdictional acts in precisely the same way as to other grants of jurisdiction to the Court of Claims unless some express words in the acts negative its application or the plaintiffs fall within the exceptions stated in section 156 of the Judicial Code. *Delaware Tribe of Indians*, 535.
II. Section 156 of the Judicial Code is not only a statute of limitation but is jurisdictional in character. It may not be waived by the defendant, and it is the duty of the court to enforce it whether the defendant raises the issue or not. *Id.*
See also, Congressional Reference, I, III, IV; Taxes, I, II, XLIV, XLVII, XLIX, LIX, LXIX, LXX, LXXI.
STATUTORY CONSTRUCTION.
I. Provisions of the general revenue laws such as the provisions of section 403 (b) (2) (3) of the Revenue

STATUTORY CONSTRUCTION—Continued.

Act of 1921 must be viewed and interpreted in the light of the obvious policy of Congress in their enactment and the well-recognized procedure of the Treasury Department and the courts in their administration and enforcement. *Siegel et al.*, 551.

II. Statutes should have a reasonable construction, and the language must be interpreted with reference to the subject matter and the general course of business to which they relate, and in such manner that the beneficent provisions of remedial laws may not be thwarted by nice technicalities obviously not within the minds of the legislators. *Id.*

See also Special Jurisdiction, I, II.

SUBROGATION.

I. The party for whose benefit the doctrine of subrogation is exercised can acquire no greater rights than those of the party for whom he is substituted; the doctrine was never intended to be used as an instrument to circumvent the principles of equity and permit a subrogee to be placed in a more advantageous position than the party from whom his rights devolved. *Globe Indemnity Co. et al.*, 587.

II. Section 172 of the Judicial Code (U. S. Code, title 28, section 279), providing for forfeiture of claims against the Government for fraud in their prosecution, not only forfeits the entire claim growing out of the transaction upon which it is founded and bars the claimant and those who may claim under him, but it destroys the right of action of the principal claimant and every person claiming by right of subrogation directly based upon the transaction out of which the claim arose. *Id.*

III. The surety of a contractor can acquire by subrogation no greater rights under the contract than those of the contractor himself; and where a claim by a contractor against the Government for breach of contract was forfeited by fraud by the contractor in its prosecution, the fraud vitiated and nullified not only all rights of the contractor in the claim, but also of those claiming under and through him or his contract. *Id.*

SUPPLEMENTAL CONTRACT.

See Contracts, XVII.

SUPREME COURT DECISIONS.

See ante, pp. 638–646.

SURPLUS GOVERNMENT PROPERTY.

See Sale of Surplus Property.

TAXES.

I. Under the provisions of section 611 of the Revenue Act of 1928, a payment in January 1926, after the expiration of the statutory period for collection, of a portion of the income and profits taxes assessed against the plaintiff for the year 1917 the collection of which had been stayed by claims for abatement filed by plaintiff, was not an overpayment recoverable by plaintiff under the provisions of section 607 of said act. *Kell Company*, 62.

II. Where the filing of the plaintiff's claims for abatement resulted not only in staying collection, but also in obtaining a reduction of the taxes, the plaintiff is in no position to claim the benefit of the statute of limitations where collection of the tax was made after the bar of the statute had fallen. *Id.*

III. Where the head of a division of the Bureau of Internal Revenue having charge and consideration of the plaintiff's tax returns had a general authorization from the Commissioner of Internal Revenue to sign the Commissioner's name to waivers extending the statutory time for assessment and collection of income and profits taxes, waivers signed by the plaintiff and having the Commissioner's name signed either by such head of division or by one of his clerks under his direction, were valid waivers. *Pennsylvania-Dixie Cement Corp.*, 66.

IV. The Commissioner of Internal Revenue notified the plaintiff in writing of proposed deficiencies in its income and profits taxes for prior years and requested it to execute and return proper waivers, inclosed with the notice, for extending the time for assessment and collection, which was done by plaintiff, both knowing that but for such waivers assessment and collection would be barred. *Held*, that the Commissioner's written request for the waivers, the plaintiff's execution and filing of them in response to such request, and the assessment and collection of the deficiencies by the Commissioner after his authority to do so had expired but for the waivers, met the requirements of the statute that both the Commissioner and the taxpayer should consent in writing to assessment and collection after the statutory period therefor had expired. *Id.*

V. Where the Commissioner of Internal Revenue advised the plaintiff on July 24, 1925, of a proposed deficiency in its income and profits taxes for the year 1916, and plaintiff on August 10, 1925, waived the right of ap-

TAXES—Continued.

peal to the Board of Tax Appeals and consented to immediate assessment of the deficiency, the assessment and collection were not invalid by reason of the Commissioner's failure to send plaintiff the 60-day deficiency notice contemplated by sections 274 (a) and 280 of the Revenue Act of 1924. *Id.*

VI. A deficiency assessment and collection of income and profits taxes against the plaintiff for the year 1917 made prior to the enactment of the Revenue Act of 1924, and an adjustment and reduction of which was based upon an agreement of the parties entered into at the request of the plaintiff, were not invalid because of the Commissioner's failure to send plaintiff a 60-day deficiency letter, such failure being at most an irregularity which did not invalidate the assessment or collection of the tax. *Id.*

VII. Where losses by the plaintiff resulting from his indorsement and payment in 1922 and 1923 of notes of an insolvent corporation in which he was a stockholder were held by the Board of Tax Appeals to be deductible from gross income in determining his taxable net income for such years, the question in a subsequent suit for refund, in the Court of Claims, of whether similar losses in 1924 and 1925 were deductible in the determination of his taxable net income for those years was *res adjudicata* under said decision of the Board of Tax Appeals. *Greenbaum*, 77.

VIII. In a suit for refund of overpayment of income tax for 1924 paid in quarterly installments, there can be no recovery of an installment for which refund claim was not filed within the limited statutory period therefor. *Id.*

IX. Deduction from gross income for amortization of loss from bond discounts and expenses of a corporation in the issuance of its bonds is allowable to a corporation subsequently assuming liability for such bonds where it was by merger or consolidation of the former corporation with the latter, but not where it was by sale or transfer of the property of the former corporation to the latter, without merger or consolidation. *American Gas & Electric Co.*, 92.

X. The right of a corporation to deduction from gross income for amortization of bond discounts and expenses in the issuance of its bonds is a right of which the corporation could under certain circumstances avail itself, but not such a right as could be transferred by

TAXES—Continued.

it to another by sale or otherwise, although it might continue to exist in cases where one corporation is merged with another. *Id.*

XI. The plaintiff held not entitled to deductions from gross income for the years 1926 and 1927, through an affiliated corporation, of unamortized bond discounts and expenses of another corporation in the issuance of its bonds liability for which was assumed by plaintiff's affiliate as the result of a series of nontaxable reorganizations under sections 203 and 204 of the Revenue Acts of 1924 and 1926, in some of which there was no merger or consolidation of the companies involved. *Id.*

XII. Deduction from gross income by the taxpayer, as loss, of the difference between the par value of bonds of another corporation for which it had assumed liability and the callable price above par at which the bonds were subsequently redeemed by it, was allowable to the taxpayer in the determination of net taxable income, the same as deduction by a taxpayer of similar loss in such redemption of its own bonds. *Id.*

XIII. The plaintiff in response to a 60-day letter from the Commissioner of Internal Revenue in March, 1927 informing it of overassessments of its income taxes for 1918 and 1919 amounting to $81,836.55, and a proposed deficiency of $100,442.20 for 1920, sent its check to the Commissioner, in advance for the amount of the proposed deficiency, from which, however, it immediately appealed to the Board of Tax Appeals. The Commissioner informed plaintiff that the $100,442.20 advance payment would be treated as a cash bond pending determination of the proposed deficiency, refused plaintiff's request for refund of the 1918 and 1919 overassessments, and informed it that they would be credited upon the 1920 deficiency, when finally determined; but later, before such final determination, refunded to plaintiff, on irregular informal overassessment schedules, the amount of such overassessments, without interest, with the express statement that interest would not be adjusted until after final determination of the 1920 deficiency. Upon final affirmative determination of the deficiency the overpayments were credited thereon by the Commissioner as provided for by section 284 (a) of the Revenue Act of 1926, and interest adjusted accordingly. *Held*, that the Commissioner's action in the crediting

TAXES—Continued.

of the overpayments and adjustment of interest was a correct and valid settlement of plaintiff's tax accounts for the years involved. The case of *Libby, McNeill & Libby* v. *United States* distinguished. *Harnischfeger Corporation*, 125.

XIV. Payment by a corporation to stockholders in redemption of a portion of its capital stock for cancellation was not, under section 115 of the Revenue Act of 1928, payment of a dividend or a distribution of earnings or profits, but was in partial liquidation of the corporation, and, as such, chargeable to capital account. *Foster et al., Executors*, 193.

XV. Where a corporation made payments to stockholders in redemption of a portion of its capital stock for cancellation, such payments were chargeable to capital account as a partial liquidation of the corporation and cannot be treated as a dividend or distribution of earnings or profits under section 115 of the Revenue Act of 1928, in order to exempt a subsequent dividend from income taxation. *Helvering* v. *Canfield*, 291 U. S. 163, and other cases differentiated. *Id.*

XVI. The primary design of the provisions of the income tax laws permitting taxpayers to credit taxes paid or accrued to foreign countries during the taxable year against their domestic taxes was to mitigate the evils of double taxation, which results when the same income is taxed in both the foreign country and the United States. *Hubbard*, 205.

XVII. Where the plaintiff, a citizen of the United States, resided in Great Britain and paid that country taxes on a salary received there which, not being a part of the net income upon which his taxes in the United States were computed, was exempt from taxation here, he was not entitled to have such foreign tax on his salary credited against his income taxes here. *Id.*

XVIII. Where a suit for refund of processing taxes and the claim for refund upon which it was based complied with the statutory requirements at the time they were filed, but the plaintiff has failed to comply with subsequent additional statutory requirements as to claims and suits for refund, and proof of burden of tax, as prerequisites to the maintenance of claims or suits in all such cases, the court is without further jurisdiction in the case. *Continental Mills, Inc.*, 247.

TAXES—Continued.

XIX. Upon a finding by the court that the social activities of the plaintiff club were not merely incidental to the predominant purpose and activity of the club, but were availed of for the purpose of attracting new members who would aid in its maintenance, and thus become an essential part of its activities and a material feature of its continued existence; *held*, that plaintiff was a social club within the meaning of the statutes taxing membership dues and fees paid to social, athletic, or sporting clubs. *Transportation Club of San Francisco*, 253.

XX. Where the social features of a club are so materially interwoven into the entire fabric of the club that without them the club could not exist, it is a social club within the intent of the statutes taxing dues and fees of members of social, athletic, or sporting clubs or organizations. *Id.*

XXI. Where the president of the plaintiff corporation had authority from the corporation to pay such dividends from its profits as would in his judgment be consistent with the policy of the corporation as to the maintenance of ample reserves, and in January 1933, directed the proper officer of the corporation to pay the same regular dividends for the year as had been paid during a number of years past, there was a declaration of such dividends within the contemplation of the provision of section 213 of the National Industrial Recovery Act of June 16, 1933, exempting from taxation thereunder dividends declared prior to the date of enactment of such act. *Evening Star Newspaper Co.*, 263.

XXII. The plaintiff contracted in 1924 with a corporation of which he was an employee for the purchase of 1,000 shares of its stock for $82.50 per share, to be paid for from bonuses and other accruals to him outside of his salary, and to be delivered to him when fully paid for. In 1928, pursuant to a planned reorganization by the corporation, and after plaintiff had paid $40,240 on the stock contracted for, the corporation offered him for his rights under the contract the $40,240 that had been paid by him, with interest thereon amounting in all to $45,327.22, together with 2,935 shares of its new reorganization stock of a fair market value of $102,725, which offer was accepted by plaintiff, and the money and stock received by him in 1929, after the reorganization of the corporation had been effected. *Held*, that the stock contracted for by plaintiff in 1924 not having been fully paid

TAXES—Continued.

for or delivered to him, he had not become the owner of it; that there was therefore no exchange of stock in the transaction in which he exchanged his rights under the contract for cash and reorganization stock of the corporation; and that his accounts being kept on a cash basis, his profit of $107,812.22 in the transaction was income taxable as capital net gain for 1929. *Goodhue*, 271.

XXIII. The exemption from taxation granted mutual insurance companies by section 103 of the Revenue Act of 1932 was intended to apply only to companies that were purely mutual, and not to those only partly mutual. *Baltimore Equitable Society*, 283.

XXIV. The plaintiff, a fire insurance company doing business under both mutual and non-mutual plans, and consequently not a "mutual" insurance company within the meaning and exemptions of sections 103 and 204 of the Revenue Act of 1932, was subject to taxation under said section 204, and was therefore exempt from the tax imposed by section 215 of the National Industrial Recovery Act of June 16, 1933, under its provision exempting from taxation thereunder any insurance company subject to the tax imposed by said section 204 of the Revenue Act of 1932. *Id.*

XXV. It is well settled that a taxpayer can not recover in a suit not based upon a claim for refund, or where the grounds set forth in the refund claim are entirely different from those upon which the suit is based. *Castle*, 300.

XXVI. The imposition of both civil and criminal liability for a violation of law is not inhibited by the Fifth Amendment to the Constitution; and a taxpayer is not relieved from criminal liability or prosecution for violation of the revenue laws as to tax returns by payment of additional taxes claimed by the Commissioner of Internal Revenue or the imposition of an *ad valorem* penalty for such violation, nor does criminal conviction for the violation bar the imposition of such penalty therefor. *Id.*

XXVII. An *ad valorem* tax penalty exacted of the taxpayer for violation of the law as to filing tax returns is in the nature of an addition to the tax, and can be refunded only upon compliance with the same conditions as are attached to the refunding of a tax. *Id.*

XXVIII. Section 3226 of the Revised Statutes with reference to the filing of claims for refund and suit thereon makes it clear that the law was intended to apply to penalties as well as to taxes. *Id.*

TAXES—Continued.

XXIX. Even though the imposition of a tax penalty were in violation of the Constitution, this would not prevent the Government from prescribing the terms upon which it might be sued for refund thereof providing such terms be reasonable and afford a complete remedy to the party aggrieved. *Id.*

XXX. Where, upon appeal by plaintiff to the Board of Tax Appeals on a proposed deficiency, after the enactment of the Revenue Act of 1926, the Board, in accordance with a stipulation by the parties, entered its order of final determination of the taxes and penalties involved, and plaintiff failed to appeal therefrom, the decision of the Board became final and conclusive upon him. *Id.*

XXXI. Where a compromise offer by plaintiff for settlement of taxes, penalties, and criminal charges against him was accepted by the Government and both parties complied with the terms of the agreement, it constituted a contract of settlement which may not be repudiated by plaintiff. *Id.*

XXXII. The depreciation in value of certain patents found to have occurred prior to the year 1927, and therefore not to be allowable as a deductible loss in the determination of taxable income for 1927 and subsequent years. *Art Metal Construction Co.*, 312.

XXXIII. While the exercise by the Commissioner of Internal Revenue of his discretion in the allowance of additions to reserves for worthless debts is subject to review, his determination of a reasonable addition to a reserve for such purpose is not to be lightly set aside, and the burden of proof is on the plaintiff to show the determination not to be reasonable. *Id.*

XXXIV. An allowance by the Commissioner of Internal Revenue of an addition to a reserve for bad debts for one year is not controlling for a subsequent year; each year must be judged on its own particular facts. *Id.*

XXXV. In order to substantiate credits for foreign taxes it is necessary to prove details of the law imposing the tax as well as the various factors fixing the date of accrual. *Id.*

XXXVI. A tax accrues when all the events have occurred which fix the amount of the tax and determine the liability of the taxpayer to pay it. *Id.*

XXXVII. Where the plaintiff paid a British income tax for the taxable year 1931–1932 based upon earnings for the calendar year 1930, and liability for which depended upon its continuance in business subsequent to the

TAXES—Continued.

end of the year 1930, such tax did not accrue during the year 1930, and therefore could not be credited against plaintiff's income tax here for that year. *Id.*

XXXVIII. When, in the course of the administration of an estate, the heirs had the right to demand of the administrator payment or possession of their shares of the estate, such shares were then in their "enjoyment" within the meaning of the act of June 13, 1898, providing for taxation of distributive shares of estates taking effect "in possession or enjoyment" after the death of the decedent. *Fitzroy*, 333.

XXXIX. Where the heirs of an estate had not, prior to July 1, 1902, received, and were not yet entitled to demand of the administrator, their distributive shares of the estate, they were not yet in possession or enjoyment thereof, and taxes thereon exacted by the Government under the act of June 13, 1898, were therefore refundable under the provisions of the act of June 27, 1902, for refund of taxes collected under the 1898 act on contingent beneficial interests not vested prior to July 1, 1902, and were recoverable by suit following rejection of claim for refund filed pursuant to the act of March 30, 1928, extending the time for the filing of such claims. *Id.*

XL. Liquidating distributions by a corporation to trustees representing capital net gain in their hands for income tax purposes under the provisions of the Revenue Act of 1926 are subject to the same provisions in the hands of beneficiaries of the trust when distributed to them although distributable only as dividends on the trust corpus under the terms of the trust and the State law controlling its administration. *McNaghten et al.*, 349.

XLI. Where a trust, during the taxable year, received taxable income in excess of the amounts distributed by it to beneficiaries of the trust, the beneficiaries can not escape taxation on distributions to them by showing that at the time of such distributions the trust had no income. *Id.*

XLII. The beneficiaries of a trust which held the stock of a corporation then in course of complete liquidation were improperly taxed on liquidation distributions by the corporation to the trust in redemption of the corporation stock where the basis of the stock had not yet been recovered by the trust. *Id.*

XLIII. The plaintiffs' claims for refund of taxes held sufficient to support their suits for refund. *Id.*

TAXES—Continued.

XLIV. Where the Commissioner of Internal Revenue, with all the facts before him necessary to the determination and assessment of taxes assessable against a trust, neglected and failed to make such assessment within the statutory limitation therefor, without such failure being contributed to by the taxpayer, there is no basis for estoppel of the taxpayer to claim refund of overpayment of taxes otherwise due and refundable by the Government. *Id.*

XLV. A power of attorney from a taxpayer authorizing an attorney to represent and act for him before the Bureau of Internal Revenue and Treasury Department in all matters in which the taxpayer was concerned, and particularly in the matter of his income tax returns and assessment of taxes thereon, was sufficient authority for the execution of income tax waivers by the attorney on behalf of the taxpayer. *Wood*, 367.

XLVI. Acceptance by the Commissioner of Internal Revenue of a waiver filed by the taxpayer under the provisions of section 284 (g) of the Revenue Act of 1926 was not essential to the validity of the waiver or to give it effect under the statute. *Id.*

XLVII. Where a claim for refund for the year 1919 dependent upon the determination of the 1917 and 1918 taxes then on appeal before the Board of Tax Appeals was rejected under the erroneous assumption that the 1919 taxes were also before the Board for determination, such purported disallowance of the claim was ineffective and did not constitute a rejection of the claim within the meaning of the statutes, from which the statute of limitations would run. *Id.*

XLVIII. In determining whether a certificate of overassessment constitutes an account stated, all the items appearing in the certificate must be considered as making up the account; and the implied promise of the Government to refund the overpayment shown by the certificate applies only to the balance remaining after the credits shown have been deducted. *Id.*

XLIX. Where a certificate of overassessment showed the total assessment for the year involved, the amount of the tax liability for the year, and the resulting overassessment and net overpayment, it constituted an account stated in favor of the taxpayer for the amount of the overpayment, notwithstanding an erroneous statement in the certificate that refund of the overpayment was barred by the statute of limitations, and a claim for

TAXES—Continued.

refund based thereon was within the jurisdiction of the court where suit was brought within six years after delivery of the certificate of overassessment. *Id.*

L. Where war time facilities were used in the taxpayer's post-war business, the reasonable amortization deduction provided by the law is the difference between the depreciated war time cost of such facilities and their value as determined by their actual post-war use in the business. *Standard Refractories Co.*, 390.

LI. Individual sales by the stockholders of the plaintiff corporation of all of the corporation stock, to another corporation, did not constitute a sale by the plaintiff of either its stock or its assets. *Id.*

LII. The rule that where the taxpayer has disposed of particular war time facilities at a price equal to or in excess of their war time cost no amortization deduction from income is allowable, approved, but held not applicable under the facts in the case. *Id.*

LIII. Even if the sale of all of plaintiff's stock by its stockholders to another corporation and the subsequent taking over of plaintiff's assets by such corporation under a bill of sale constituted a sale by plaintiff of its assets, it would not be precluded from a deduction from income for amortization of its war time facilities unless it were shown that such facilities were included in such sale and it had therefrom recaptured their cost in whole or in part. *Id.*

LIV. The undepreciated cost to the taxpayer of old buildings demolished by a lessee pursuant to a long-time lease under which the lessee was to erect modern structures in their stead was not deductible from income as loss wholly sustained at the time the buildings were demolished, but was deductible on the basis of amortization of such cost over the entire term of the lease. *Continental Ill. National Bank & Trust Co.*, 405.

LV. Where under the terms of a will one-half of a trust estate created thereunder was, upon the termination of the trust, to go to a specified charitable institution; and, pursuant to the will, the sum of $44,219.10 of the trust income for 1925 was set aside and credited to a fund for building and protection of the trust estate against impairment, and one-half of this sum permanently set aside for such charitable institution, the trust was entitled, in the computation of its taxable net income, to a deduction of the amount so set aside for said institution. *Id.*

TAXES—Continued.

LVI. Where, in a suit for refund of income tax, the Government sets up as an offset an item of additional tax based upon a contention of error by the Commissioner of Internal Revenue in the computation of the tax, it has the burden of sustaining its contention by the preponderance of the evidence. *Id.*

LVII. Dividends declared and accredited to a stockholder on the books of a corporation, and subject to payment on his demand, were taxable as income to him; and it is immaterial that the cash balance of the corporation was not sufficient at all times to have paid the dividends, if the corporation was solvent and its financial condition such that they could have been paid whenever demanded by the stockholder. *Baker*, 428.

LVIII. It was not necessary that dividends credited to the plaintiff stockholder's account on the books of the corporation, and subject to his demand, be reduced to actual possession in order to render them taxable as income to him. *Id.*

LIX. A claim for refund of income tax may be amended to include new items of claim after the statute of limitations has run against the filing of a new claim if the amendment be filed before final action by the Commissioner of Internal Revenue on the original claim. *Andrews*, 460.

LX. Where the head of a division of the Bureau of Internal Revenue having consideration of income tax returns was duly authorized to sign the name of the Commissioner of Internal Revenue to waivers by taxpayers, extending the time for assessment or collection, a waiver having the Commissioner's name signed thereto with the initials of such head of division thereunder, not by such head of division but by some employee of his office, under his instructions and direction, and which was approved or adopted by him and duly recorded and acted upon by the Bureau, constituted a valid waiver for the purpose of its execution by the taxpayer. *Graton & Knight Co.*, 496.

LXI. Where, upon individual income-tax returns by a husband and wife, the Commissioner of Internal Revenue duly determined an overpayment by the wife and a deficiency against the husband, which was sustained by the Board of Tax Appeals, the wife's overpayment could not, in the absence of her consent or approval, be credited on the husband's deficiency. *Krug*, 502.

TAXES—Continued.

LXII. Where, pursuant to a suit in equity instituted in 1929 against the plaintiff corporation by minority holders of the common stock of a corporation merged with the plaintiff, for a greater value of their stock than had been allowed in the merger, the plaintiff set up a reserve to meet the contingency of a decision against it, and the court entered its decree in 1931 allowing the stockholders an increased valuation for their stock, together with interest thereon, such interest was contingent, and did not accrue within the meaning of the tax law allowing deductions for interest, until the court's decision or decree, and was therefore not allowable as a deduction from income in plaintiff's tax returns, on the accrual basis, for the years 1929 and 1930. *Allegheny Steel Co.*, 514.

LXIII. Losses or interest the accrual of which depends upon the result of a contested action in court are not definitely fixed and deductible from income prior to rendition of judgment in the suit. *Id.*

LXIV. The realty of a decedent's estate in the State of Florida is not subject to the payment of administrative expenses of the estate, and the interests of his children in such realty are therefore not subject to Federal estate tax under the provisions of section 302 (a) of the Revenue Act of 1924. *Henderson et al.*, 525.

LXV. Under the laws of the State of Florida the wife's right to dower in the realty of the husband's estate becomes absolute upon his death; and where the wife, subsequent to the husband's death, elected to take under his will, in lieu of dower, it was her dower interest in the realty which was subject to the Federal estate tax under section 302 (b) of the Revenue Act of 1924, and not the interest taken by her under the will, nor a child's part, of which she had made no election in lieu of dower. *Id.*

LXVI. Where the taxpayer filed a claim for abatement of a timely assessment in 1922 of additional income and profits taxes for 1918, which claim was in 1927 allowed in part and certain overpayments of taxes for 1919 and subsequent years applied by credit on the remainder of the additional assessment after the expiration of the statutory period for its collection, such application of the overpayments was not void under the provisions of section 609 of the Revenue Act of 1928, in view of the provisions of section 611 of said act. *Scioto Valley Supply Co.*, 541.

TAXES—Continued.

LXVII. There is no basis for suit or recovery against the Government by a taxpayer on an account stated where the account rendered by the Commissioner of Internal Revenue fails to show a balance due the taxpayer. *Id.*

LXVIII. Where the taxpayer in 1926 gave bond for payment of additional income and profits taxes timely assessed in 1922 for the year 1918 against which it had a claim in abatement pending, subsequently requested and secured a reduction in the amount of the bond on account of a reduction of the amount due on the additional assessment by the crediting thereon by the Commissioner of Internal Revenue of certain overpayments of taxes for other years, the taxpayer's action constituted such an acquiescence in or acceptance of the Commissioner's action in crediting such overpayments on the additional assessment that it cannot be heard to question the regularity of such action. *Id.*

LXIX. The limitation period of four years provided in section 3228, Revised Statutes, as amended, with reference to the filing of claims for refund of taxes in ordinary cases does not apply to refunds directed to be made by section 403 (b) (2) (3) of the Revenue Act of 1921 where the tax was collected from the estate of a second decedent dying prior to the enactment of the estate tax provisions of the Revenue Act of 1918. *Siegel et al.*, 551.

LXX. The intent of Congress in section 403 (b) (2) (3) of the Revenue Act of 1921 was that all estates which had paid a tax by reason of inclusion in the net estate of property of a prior estate which had been previously taxed within five years should be entitled to deduction of such property, a redetermination of the tax, and refund of the excess tax that had been paid, without regard to the limitation of time within which the Commissioner of Internal Revenue could make a refund without claim, or the time within which claims for refund could be filed under section 3228, Revised Statutes. *Id.*

LXXI. By enactment of the retroactive provision of section 403 (b) (2) (3) of the Revenue Act of 1921, Congress intended that the Commissioner of Internal Revenue should, with or without a formal claim, redetermine the tax of estates of all decedents dying prior to February 25, 1919, that had not received the benefit of deduction of such portions thereof as had within a

TAXES—Continued.

period of five years been taxed as a part of a prior estate, and refund any resulting overpayment; and that in the event of the Commissioner's refusal to make such refund, suit therefor might be brought within two years after such refusal or disallowance of refund. *Id.*

LXXII. The general statutes providing for interest on refunds of tax overpayments are applicable to refunds of estate tax under the retroactive provisions of section 403 (b) (2) (3) of the Revenue Act of 1921 providing for refund of estate taxes paid on property of the decedent's estate which had been a part of the estate of another person who had died within five years of the death of the decedent. *Id.*

LXXIII. The administrator *de bonis non*, w. w. a., and not residuary legatees, was the proper party to prefer claim and secure refund, under the retroactive provisions of section 403 (b) (2) (3) of the Revenue Act of 1921, of estate tax paid on property of the decedent's estate which had been a part of the estate of another person who had died within five years preceding the decedent's death; and suit for refund of such tax could be brought within two years after rejection of the claim by the Commissioner of Internal Revenue. It is immaterial that a claim had been presented by the legatees and rejected by the Commissioner more than two years before suit was brought by the administrator. *Detroit Trust Co.*, 561.

LXXIV. Where the plaintiff, the trustee of an estate, failed until December 1931, to write off on the books of the estate losses in 1929 on bonds held by the estate, or to claim deduction of such losses in determining net income of the estate until the filing of a claim for refund in February 1932, based on allowance of deduction of such losses for 1929, the disallowance of such deduction and claim by the Commissioner of Internal Revenue, in view of the discretionary provisions of section 23 (j) of the Revenue Act of 1928, should not be reversed by the court in the absence of abuse of discretion on the part of the Commissioner. *McMillan, Trustee*, 580.

LXXV. Refund claims, whether formal or informal, are not required to be filed with the Commissioner of Internal Revenue; a claim that would be good if filed with and accepted by the Commissioner is good if filed with and accepted by the collector. *Night Hawk Leasing Co.*, 596.

TAXES—Continued.

LXXVI. A written document constituting a demand, on proper grounds, for the return of money paid by the taxpayer, when accepted as such by the collector of internal revenue, is sufficient to constitute an informal claim for refund. *Id.*

LXXVII. Where the taxpayer had appeals pending before the Board of Tax Appeals from proposed income tax deficiencies for the years 1923–1927, and upon demand, and under protest based on the same grounds as its appeals before the Board of Tax Appeals, paid the collector by check additional taxes for 1928 and 1929, indorsing on the back of each check, "This check is accepted as paid under protest pending final decision of the higher courts", and the checks were accepted and indorsed by the collector under such indorsements thereon, such indorsements by the taxpayer constituted informal refund claims which could properly be completed prior to final action thereon by the Commissioner of Internal Revenue. *Id.*

LXXVIII. The revenue acts provide that taxes upon trust income not distributable or distributed to the beneficiary of the trust shall be paid by the trust; but that in the case of a distributable trust, the taxes shall be paid by the beneficiary on the amounts distributed or distributable. *Bence*, 605.

LXXIX. Where a trust receives nondistributable income from sources within the United States, the identity of such income, as being from the sources from which received ceases upon its being returned and taxed to the trustee; while in the case of a distributable trust, the trust is a mere conduit through which the income passes to the beneficiary, who is made taxable thereon, the amounts received by the beneficiary retaining their identity as income from sources within the United States until their receipt by the beneficiary, who under the statutes is taxable thereon. In other words, receipt by the trust of money distributable to a beneficiary is, for the purpose of taxation, receipt by the beneficiary. *Id.*

LXXX. Distributable income from sources within the United States to a nonresident alien through, and as a beneficiary of, an alien trust was taxable to such beneficiary under the Revenue Act of 1926. *Id.*

LXXXI. Where a nonresident alien filed claims for refund of income taxes on the ground that the income taxed was not received from sources within the United States,

TAXES—Continued.

and during conferences with the office of the Commissioner of Internal Revenue her right to deductions for income taxes paid the Government of Great Britain was discussed and conceded and additional time granted her to show the amount of such British taxes, and she later filed receipts therefor as a part of her refund claims, and the Commissioner allowed the deductions in the computation of her tax liability but refused to refund the resulting overpayments, the claims as amended by the filing of such receipts were sufficient claims for refund of such overpayments. *Id.*

TRANSPORTATION OF MAILS.
See Contracts, XV.

TRANSPORTATION OF OFFICER'S PROPERTY.
See General Average, I, II.

TRUST INCOME.
See Taxes, LXXVIII, LXXIX, LXXX.

UNILATERAL CONTRACT.
See Indians, II.

WAIVER.
See Taxes, III, IV, V, XLV, XLVI, LX.

WORTHLESS DEBTS.
See Taxes, XXXIII, XXXIV.

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